IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
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OCTOBER TERM, 1966

No. 675

LAIRD & COMPANY, a Corporation; AFFILIATED DISTILLERS BRAND CORP., a Corporation; BROWN-FOREMAN DISTILLERS CORP., a Corporation; CANADA DRY CORPORATION, a Corporation; GLENMORE DISTILLERIES COMPANY, a Corporation; GOODERHAM & WORTS, LIMITED, a Corporation; HIRAM WALKER INCORPORATED, a Corporation; HUEBLEIN, INC., a Corporation; JAMES B. BEAM DISTILLING CO., INC., a Corporation; JAS. BARCLAY & CO., LIMITED, a Corporation; MR. BOSTON DISTILLER, INC., a Corporation; NATIONAL DISTILLERS AND CHEMICAL CORPORATION, a Corporation; STITZEL-WELLER DISTILLERY, INC., a Corporation; THE AMERICAN DISTILLING COMPANY, a Corporation; THE FLEISCHMANN DISTILLING CORP., a Corporation; THE HOUSE OF SEAGRAM, INC., a Corporation; W. A. TAYLOR & COMPANY, a Corporation; HIRAM WALKER-G. & W. INC., a Corporation; BARTON DISTILLING COMPANY, a Corporation; BACARDI IMPORTS, INC., a Corporation; MOGEN DAVID WINE CORPORATION, a Corporation; PUBLICKER DISTILLER PRODUCTS, INC., a Corporation; RENFIELD IMPORTERS, LTD., a Corporation; SCHIEFFELIN & CO., a Corporation; FROMM & SICHEL, INC., a Corporation; PAUL MASSON, INC., a Corporation; STAR HILL DISTRIBUTING CO., a Corporation; McCORMICK DISTILLING CO., a Corporation; E. J. GALLO WINERY, a Corporation; McKESSON & ROBBINS, INCORPORATED, a Corporation; TWENTY-ONE BRANDS, INC., a Corporation; MEDAL DISTILLED PRODUCTS, INC., a Corporation

Appellants,

VS.

J. R. CHENEY, Director of Alcoholic Beverage Control; EVERETT STEERMAN, ROBERT F. GALLOWAY and ALFRED WILLIAMS, Members of the Alcoholic Beverage Control Board of Review; ROBERT C. LONDERHOLM, Attorney General of the State of Kansas,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

JURISDICTIONAL STATEMENT

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

JURISDICTIONAL STATEMENT

Appellants appeal from a judgment of the Supreme Court of the State of Kansas filed on May 7, 1966, sustaining the validity of Section 2 of Chapter 241, Laws of Kansas 1961 (Senate Bill No. 253; K.S.A. 41-1112), as said section applies to appellants in this case, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

CITATION OF OPINIONS BELOW

The opinion of the Supreme Court of the State of Kansas is reported in 196 Kan. 675, ... P. 2d ....., and is set forth in Appendix A hereto. A copy of the Journal Entry of Judgment, Findings of Fact, Conclusions of Law and Decision of the District Court of Shawnee County, Kansas (the Trial Court) is set forth in Appendix B hereto. This latter decision is not officially reported.

JURISDICTION

This action was commenced by certain out-of-state manufacturers or suppliers of intoxicating liquors for declaratory judgment and injunctive relief, against the enforcement of a state statute of Kansas as being unconstitutional. The plaintiffs' (appellants herein) petition alleged that the statute is unconstitutional as being in violation of the due process clause of the Fourteenth Amendment, and of the Interstate Commerce Clause (Article I, Section 8), of the Constitution of the United States (and of Sections 1 and 18 of the Bill of Rights of the Constitu-

tion of the State of Kansas). The defendants (now appellees) joined issues by answer.

The District Court of Shawnee County, Kansas (the trial court), made findings of fact and conclusions of law and entered judgment in favor of the plaintiffs (appellants) and against the defendants (appellees) in accordance with the prayer of the petition. On May 7, 1966, the Supreme Court of the State of Kansas filed its opinion which reversed the judgment of the trial court and upheld the validity of the challenged state statute. On June 15, 1966, appellants herein filed a timely and proper Motion for Rehearing and for Modification of the Kansas Court's Opinion (Tr. 203), which was denied on July 1, 1966, but the Kansas Court ordered its Mandate stayed for 30 days (Tr. 227).

On July 27, 1966, appellants filed with Chief Justice Robert T. Price a Motion For Stay of the Kansas Court's Mandate pending a Notice of Appeal and final determination by this Court. This Motion was denied on July 28, 1966 (Tr. 228); however, the Kansas Supreme Court granted an additional stay of its Mandate until August 15, 1966, in order to provide time for appellants herein to apply to an individual Justice of this Court for a stay of the Kansas Court's Mandate. On August 9, 1966, appellants filed an Application for Stay of Mandate and Judgment of the Supreme Court of the State of Kansas with Mr. Justice White, the Circuit Justice for the Tenth Circuit. This application was denied by Mr. Justice Brennan on August 12, 1966. Appellants' Notice of Appeal was filed with the Supreme Court of the State of Kansas on August

11, 1966 (Tr. 229). On October 7, 1966, the Supreme Court of the State of Kansas for good cause shown entered an order enlarging the time for docketing this case in this Court to and including October 14, 1966. The Mandate of the Kansas Court was entered and dated August 16, 1966, and is set forth in Appendix C hereto.

Jurisdiction to hear this direct appeal is conferred on this Court by 28 U.S.C. §1257(2). The following cases sustain the jurisdiction of the Supreme Court on direct appeal to review the judgment in this case:

Carter v. *Virginia*, 321 U.S. 131 (1944).

Southern Pacific Co. v. *Arizona*, 325 U.S. 761 (1945).

Poulos v. *Town of Hampshire*, 345 U.S. 395 (1953).

Goldblatt v. *Town of Hempstead*, 369 U.S. 590 (1962).

Joseph E. Seagram & Sons v. *Hostetter*, ... U.S. ....., 16 L. Ed. 336 (1966).

STATUTES INVOLVED

The Kansas statute the validity of which is challenged is Section 2 of Chapter 241, L. 1961 (now K.S.A. 41-1112). It provides as follows:

> "Sec. 2. The prices filed by manufacturers and others authorized to sell alcoholic liquors to licensed distributors, pursuant to subsection (1) of section 41-1101 of the General Statutes Supplement of 1959, shall be the current prices, F.O.B. point of shipment, and said price as filed by each manufacturer or vendor shall be as low as the lowest price for which the item is sold anywhere in any state in the continental United States by such manufacturer or vendor: Provided,

> That in determining the lowest price for which an item of alcoholic liquor is sold in any such state there shall be taken into consideration all advertising, depletion and promotional allowances and rebates of every kind whatsoever made to purchasers in such state by the vendor."

The above Section 2 was a part of Senate Bill No. 253 which was enacted into law by the 1961 Session of the Kansas Legislature. It appears as Chapter 241 of the 1961 Laws of Kansas, now K.S.A. 41-1111 to 41-1121, inclusive. The entire act as it now appears in the Kansas Statutes Annotated is set forth in Appendix D hereto.

Prior to the enactment of the 1961 law, appellants were selling and supplying alcoholic liquor to Kansas licensed distributors and filing prices therefor in compliance with subsection (1), Section 41-1101, G.S., 1959 Supp. (now K.S.A. 41-1101 [1]), which is set forth in Appendix E hereto.

After the enactment of the 1961 law, the Kansas Director of Alcoholic Beverage Control, implemented Section 2 of the law, K.S.A. 41-1112, by issuing Memorandum No. 61-48 (Book of Exhibits P. 10), which required a sworn affirmation that the posted prices meet the "low of the lowest" requirements of Section 2 of Senate Bill No. 253, K.S.A. 41-1112. This Memorandum is set forth in Appendix F hereto. Senate Bill No. 253, particularly Section 2 thereof, K.S.A. 41-1112, together with Memorandum No. 61-48 was the "law" that was in effect at the time appellants filed this action and was the "law" challenged as being unconstitutional in this Declaratory Judgment suit.

The Kansas Act relating to Declaratory Judgments (Chapter 168, Laws of Kansas 1921), under which appellants started this action is found in the General Statutes of Kansas, 1949, Sections 60-3127 to 60-3132, inclusive, which are set forth in Appendix G hereto.

QUESTIONS PRESENTED

1. Does the Twenty-First Amendment to the Constitution of the United States permit the Kansas Legislature to enact laws violative of other constitutional guarantees?

2. Does the application of Section 2 of S. B. 253 (K.S.A. 41-1112) violate Section 8 of Article I of the Constitution of the United States as an unlawful regulation of interstate commerce?

3. Does the application of Section 2 of S. B. 253 (K.S.A. 41-1112) and the rules and regulations enforcing it either standing alone, or in conjunction with Section 11 of S. B. 253 (K.S.A. 41-1121) violate the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States as being vague and indefinite?

4. Does the application of Section 2 of S. B. 253 (K.S.A. 41-1112) violate the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States as an arbitrary and unreasonable exercise of the police power?

5. Does the application of Section 2 of S. B. 253 (K.S.A. 41-1112) violate the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States by taking Appellants' property without due process of law?

STATEMENT OF THE CASE

Each of the appellants is engaged in the business of manufacturing and selling or of selling alcoholic liquors in the several states of the United States. (For convenience and brevity, they will be referred to hereinafter as "suppliers," where appropriate). For several years each has been selling and shipping alcoholic liquor from points outside of Kansas to Kansas licensed distributors in compliance with the laws of the state. Although the laws of Kansas require that distributors and retailers of alcoholic liquors obtain a license from the state to conduct such businesses, out-of-state suppliers such as appellants are not required to obtain a license to sell and ship alcoholic liquors to Kansas licensed distributors (Appendix A, page A3). Appellants' sales to Kansas distributors represent approximately 92% of all alcoholic liquors sold to them.

The appellees are the individuals who, in their several capacities, have the power and duty of enforcing the Kansas liquor laws.

A. The Challenged Statute and the Price-Filing Requirements at the Time of Its Enactment

Prior to April 10, 1961, appellants (suppliers) were selling alcoholic liquors to Kansas licensed distributors and filing price lists therefor with the Kansas Director of Alcoholic Beverage Control pursuant to Subsection (1), Section 41-1101, G.S., 1959 Supp. [the Kansas Liquor Control Act, as amended, which is now K.S.A. 41-1101(1) [see Appendix E] and the rules and regulations promulgated thereunder. Said Subsection (1) made it unlawful for any

Kansas licensed distributor to purchase alcoholic liquor from any supplier unless the latter shall file with the Director a sworn written statement in which he agrees (1) that he will sell any of the brands or kinds of alcoholic liquor manufactured or distributed by him to any licensed distributor in Kansas; (2) that such sales will be made to all such licensed distributors at the same current price without discrimination; and (3) that price lists showing the current prices will be filed in the office of the Director as often as may be necessary or required by the Director, but at least once each three months. It provided further that if any supplier making such agreement shall violate it (1) by refusing to sell to any licensed distributor in Kansas, or (2) shall discriminate in current prices among such licensed distributors, the Director shall notify each licensed distributor in Kansas of such violation, and, thereupon it shall be unlawful for a licensed distributor in Kansas to purchase alcoholic liquor from such suppliers, and if he does so purchase, "his license shall be revoked by the Director."

The 1961 Kansas legislature enacted Senate Bill No. 253 as Ch. 241, Sections 1 to 11 (K.S.A. 41-1111 to 41-1121, Appendix D). Section 2 thereof (now K.S.A. 41-1112) provides that the current prices filed by suppliers pursuant to said Subsection (1) for alcoholic liquors to be sold to Kansas distributors shall be the current prices, F.O.B. point of shipment, and shall be as "low as the lowest" price for which the item is sold anywhere in any state in the continental United States by such supplier, provided that in determining the lowest price for which an

item is sold in any other state, there shall be taken into consideration all advertising, depletion and promotional allowances and rebates of every kind whatsoever made to purchasers in such state by the vendor.

The effective date of Senate Bill 253, now K.S.A. 41-1111 to 1121 (Appendix D), was April 10, 1961. On May 19, 1961, the Director promulgated Memorandum No. 61-48 (Appendix F) which required: (1) that all suppliers revise their price postings; (2) that the current prices, F.O.B. point of shipment must be in accordance with Section 2 of Senate Bill 253; (3) that the postings should be filed by the suppliers desiring to do business in Kansas on or before June 20, 1961, to be effective August 1, 1961, for a three month period and (4) that on said posting will be a "sworn statement" by a qualified member of the supplier's organization that said prices meet the requirements of Section 2 of Senate Bill 253. Thus, Senate Bill 253 as implemented by Memorandum No. 61-48, was the law that was in effect at the time appellants filed this action.

The statute challenged is a "maximum" price law which provides in effect that the highest price a supplier can charge a Kansas distributor for an item is the lowest price for which the item is sold anywhere in the continental United States. This lowest price is to be calculated by "taking into consideration" the several allowances specified, made by appellants to purchasers in such other states, i.e., such allowances are deducted and reflected in the price to the Kansas distributors and notwithstanding the following facts and factors established and undisputed before the trial court: *that* all such allowances are prohibited

in Kansas and Section 2 forces appellants (suppliers) to give Kansas distributors as reduction in prices the allowances lawfully made to distributors in other states (Findings 24, 26, Appendix B; Appendix A, page A14); *that* for such allowances the distributors in such other states perform services in promoting the sale of the suppliers' products whereas the Kansas distributors perform no service for the corresponding price reduction; *that* the suppliers' F.O.B. price is uniform in the several states and that the price reduction which Section 2 gives the Kansas distributors does not result from any change in said F.O.B. price, nor in the factors by which it is determined, nor in the factors which determine the distributors' "delivered cost" (Findings 16, 17, 19, 20, Appendix B); *that* there is no competition between Kansas distributors and those in other states and the price at which an item is sold to a distributor in any other state has no bearing upon the price it is sold to Kansas distributors, or vice versa (Finding 18, Appendix B); *that* there is no relationship between the price at which a supplier sells alcoholic liquors to distributors in other states and who sells, buys or consumes such products in Kansas, nor to the type or kind of place at which, nor to the character of the surroundings and circumstances under which, such are sold in Kansas; nor to violations of law in Kansas arising out of the excessive use of intoxicants in Kansas; nor to the production of revenue in Kansas; nor to "price cutting" or "cutthroat competition"; nor to the social, moral and economic problems or evils attendant upon the alcoholic liquor traffic in Kansas (Tr. 82, 83-84, 85, 88, 91, 120, 121, 125, 135, 137, 140, 155, 159, 161, 162); *that* when the supplier has sold his product to the

distributor at the F.O.B. point of shipment price and the distributor has paid for it, he owns it and has responsibility of selling it; and *that* the supplier-purchaser relationship no longer exists, the supplier-distributor price-cycle has ended and the supplier no longer has any control over the purchase price (Finding 18, Appendix B, Tr. 107, 135, 151, 153).

B. Proceedings in the Courts Below; How the Federal Question Was Presented.

On June 14, 1961, appellants commenced this action for Declaratory Judgment and Injunctive Relief against the enforcement of Senate Bill 253, now K.S.A. 41-1111 to 41-1121 (Appendix D). Such action was authorized by the Kansas Act relating to Declaratory Judgments (Appendix G). Under this Act, Courts have jurisdiction to determine the validity of a statute *before* a party undertakes to act in apparent violation thereof, "that is the purpose and intent of the remedial relief contemplated by the Act." *State Association of Chiropractors* v. *Anderson*, 186 Kan. 130, 135, 348 P. 2d 1042 (1960). "In appraising the validity and effect of the statute it is proper to examine and determine what may be required under it pursuant to its provisions. The inquiry is not confined to what has been done under the Act. . . . The constitutional validity of a law is tested by what may by its authority be done." *Gilbert* v. *Matthews*, 186 Kan. 672, 685, 352 P. 2d 58 (1960).

Appellants' petition in the trial Court (Tr. pp. 9-23), challenged the constitutional validity of Section 2 of Senate Bill 253 (K.S.A. 41-1112, Appendix D) under the Federal and State Constitutions, and specifically asserted that

said Section 2 violated the Commerce Clause, Article I, Section 8, and the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

On the same day, June 14, 1961, the trial Court entered an Order restraining appellees from enforcing or applying the provisions of Senate Bill 253, which restraining order was modified on June 20, 1961, to apply only to the price filings required under Section 2 and the criminal sanctions of Section 11 of the Act (K.S.A. 41-1112 and 1121, Appendix D). This restraining order was later further modified to apply only to the parties to this action.

At the hearing on appellants' Motion for Temporary Injunction held on July 14, 1961, the trial Court for good cause shown based on the statements of counsel for both parties, continued the Restraining Order as modified in force and effect until further order of the Court. Thereafter, issues were joined by appellees' Answer and appellants' Reply.

A full trial of the issues was held on December 9, 10 and 11, 1963. At the trial, oral testimony was received, documentary exhibits were offered and received in evidence, the testimony of appellants' witnesses, which was taken prior to trial by deposition, at which witnesses were examined and cross-examined, was offered and read, in question and answer form, objections were made, argued and ruled upon by the trial Court, and such depositions were received. Prior to the trial the parties had stipulated that said depositions together with appellants' Exhibits 1 through 7 could be used in evidence. Exhibit 7 was the Motion for Temporary Injunction with accompanying affidavits, A through G (Tr. 23-39, and 94).

On June 27, 1964, the trial Court entered its Journal Entry of Judgment which contained extensive findings of facts and conclusions of law (Appendix B), and rendered general judgment in favor of plaintiffs, now appellants, and against defendants, now appellees. The trial Court found and concluded that Section 2 of Senate Bill 253 (K.S.A. 41-1112, Appendix D) was an unlawful regulation of interstate commerce in violation of Article I, Section 8, of the United States Constitution; that Section 2 of Senate Bill 253 was arbitrary, unreasonable, and capricious and its enforcement would violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States; and also that this Act violated specified sections of the Constitution of the State of Kansas; and that the rules and regulations of defendants, and each of them, based upon Senate Bill 253 were arbitrary, unreasonable and capricious, and therefore void.

Contrast the above trial, evidence, and findings of fact made in this Kansas case with the situation presented in *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, decided April 19, 1966, ... U.S. ....., 16 L. Ed. 2d 336, where this Court upheld a New York liquor pricing statute as constitutional "on its face." The New York case never went to trial. No witnesses were sworn or gave testimony, or were ever examined and cross-examined. The Court did not make any Findings of Fact. The issues were never joined, as the New York trial Court disposed of the case at the pleading stage by directing judgment in favor of the defendants on their Cross Motion to declare the New York

statute valid, which the trial Court treated as one for Summary Judgment.

The defendants, appellees here, appealed the trial Court's decision to the Kansas Supreme Court. The appellees herein in their Amended Statement of Points (Tr. 3-4), which is required under Kansas appeal procedure, specifically appealed from the trial Court's judgment, findings and conclusions that Senate Bill 253, and particularly K.S.A. 41-1112, was unconstitutional and void under the Commerce Clause and the Due Process Clause of the Fourteenth Amendment. Briefs were filed by both parties and oral arguments were made on January 21, 1966, on the constitutional questions raised in the trial Court, and by appellees' appeal, and on May 7, 1966, the Kansas Supreme Court rendered its decision (Appendix A) which reversed the trial Court, upheld the validity of the state statute under consideration, and held that the statute as construed is not violative of the Interstate Commerce Clause nor of the Due Process or Equal Protection Clauses of the Federal Constitution, nor of the Kansas Constitution, on the grounds urged. Thereafter, on August 11, 1966, appellants filed their notice of appeal to this Court.

Section 10 of Senate Bill 253 (K.S.A. 41-1120, Appendix D) declared said Act to be supplemental to and a part of the Kansas Liquor Control Act. In this lawsuit, appellants challenged only the "maximum" price provisions of the "low of the lowest" requirements of Section 2 of Senate Bill 253 (K.S.A. 41-1112, Appendix D). The "minimum" price parts of Senate Bill 253, Sections 3 to 7 (K.S.A. 41-1113 to 41-1117, Appendix D), which provide for the

fixing by the Kansas Alcoholic Beverage Control Board of Review of minimum sales prices for sales from distributors to retailers and from retailers to consumers, have never been challenged or restrained. Therefore, the minimum price law for sales from distributors to retailers and from retailers to consumers can and presumably has operated on the current price filings required under the old law, Section (1) of K.S.A. 41-1101 (Appendix E), ever since their enactment, and during the pendency of this litigation.

THE QUESTIONS ARE SUBSTANTIAL

This appeal presents important constitutional questions involving the relationship of the Twenty-First Amendment to the United States Constitution to the Commerce Clause of Section 8 of Article I and to the Due Process Clause of the Fourteenth Amendment to the same Constitution. The Twenty-First Amendment was originally passed to allow states to regulate alcoholic liquors within their borders as they see fit, and it has been previously applied only in cases where the regulations protected internal state problems, that were local in effect. Prior to the Kansas decision, no Court has ever allowed a state to regulate alcoholic liquors in such a way that the effect of the regulation in its application is to unreasonably burden out-of-state operations, as a matter of fact.

When Kansas passed the challenged "low of the lowest" liquor pricing statute in 1961, it was the first state in the United States to have such a law, thereafter New York passed a "low of the lowest" liquor pricing statute in 1964

(Chapter 531, 1964 New York Session Laws), which this Court upheld "on its face" in *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, decided April 19, 1966, ... U.S. ....., 16 L. ed. 2d 336. Very recently, in July, 1966, the State of Massachusetts has passed a "low of the lowest" liquor pricing law. (House Bill No. 3911). The rapid increase in the number of states enacting liquor pricing statutes that require the price to be filed in the legislating state to be determined and calculated by activities taking place in other states points to the great public importance of the questions presented, particularly to corporations or other business entities conducting liquor operations in more than one state.

POINT I

The Twenty-First Amendment Does Not Permit a State Legislature to Enact Liquor Laws That Violate Other Constitutional Guarantees.

Although the Twenty-First Amendment demands wide latitude for regulation of alcoholic liquor by the state, this Court has stated that the Twenty-First Amendment, "has not given the states plenary and exclusive power to regulate the conduct of persons doing an interstate liquor business outside their boundaries." *United States* v. *Frankfort Distilleries*, 324 U.S. 293, 299, 89 L. ed. 951, 956 (1945).

The Twenty-First Amendment has not repealed either the Interstate Commerce Clause or the Due Process Clause of the Fourteenth Amendment. Both of them are parts of the same Constitution, and "each must be considered in the light of the other. . . ." (*Hostetter* v. *Idlewild Liquor Corp.*, 337 U.S. 324, 12 L. ed. 2d 350, 356 (1964).

Since this Court has held that the Twenty-First Amendment does not permit a state to prevent transactions carried on under the aegis of a law passed by Congress in the exercise of its explicit power to regulate Commerce with foreign nations, *Hostetter* v. *Idlewild*, supra; or to prevent the transportation of liquor across a state for ultimate delivery and use in a federal enclave, *Collins* v. *Yosemite Park Co.*, 304 U.S. 518, 82 L. ed. 1502 (1937); or to deprive Congress of authority to control the importation of intoxicating liquors into the United States, *Jameson* v. *Morgenthau*, 307 U.S. 171, 83 L. ed. 1189 (1939); or to prevent Congress, under its war power from imposing maximum price regulations with respect to the sale of intoxicants at retail within the state, *Jatros* v. *Bowles*, 143 F. 2d 453 (6th Cir. 1944); or to permit what the "import-export" clause of Section 10 of Article I of the Constitution forbids, *Department of Justice* v. *Beam Distilling Co.*, 337 U.S. 341, 12 L. ed. 2d 362 (1964); it certainly should not approve of the Twenty-First Amendment being used to sustain this Kansas statute which has been found by the trier of facts, the trial Court, after a full trial in a Declaratory Judgment action, to violate both the Commerce Clause of Section 8 of Article I, and the Due Process Clause of the Fourteenth Amendment of the same Constitution, as being vague and indefinite, arbitrary and unreasonable, without exploring the facts upon which the trial Court made its decision.

POINT II

The Application and Effect of the "Low of the Lowest" Price Calculations Required by Section 2 of Senate Bill 253, K.S.A. 41-1112, Is to Unlawfully and Unreasonably Regulate Appellants' Right to Engage in Interstate Commerce in Violation of Article I, Section 8 of the United States Constitution.

The Kansas Supreme Court disregarded and ignored all of appellants' testimony and evidence and the trial Court's findings of fact which related to extraterritorial effect and applications of the challenged statute, K.S.A. 41-1112. The trial Court found from the evidence that Section 2 of Senate Bill 253, K.S.A. 41-1112, forces appellants to surrender their rights to freely engage in interstate commerce, and that this statute is an imposition by Kansas of an undue, unreasonable, and arbitrary burden on interstate commerce (Finding of fact, #26, Appendix B). The Kansas Supreme Court dismissed appellants' arguments in support of the trial Court's findings and conclusions by stating: "these ingenious contentions, based on appellees' [appellants herein] *largely self-serving declarations, are speculative and conjectural* as to what extraterritorial effect the law may have in the future and we think, therefore, without merit." (Emphasis added) (Appendix A, page A8).

This summary dismissal of all the evidence and testimony establishing a violation of the Commerce Clause was erroneous, unwarranted and without precedent in a declaratory judgment action. In the first place, the phrase "self-serving declaration" has no application to this case.

It is virtual hornbook law that a "self-serving declaration" is one made by a party in his own interest at some place and time out of Court, and *it does not include testimony which he gives as a witness at the trial* (31A C.J.S., Evidence, §216, "Self-Serving Declarations," pp. 582, 590). The fact that a witness' testimony serves to prove his contention does not make it a self-serving declaration, nor is the sworn testimony of a witness to be discredited because it supports that for which he contends. (*Weir* v. *C.I.R.*, 283 F. 2d 675, 680 (6th Cir. 1960); *N.L.R.B.* v. *Walton Manufacturing Co.*, 286 F. 2d 26, 28 (5th Cir. 1961).)

Furthermore, by dismissing appellants' evidence and testimony as speculative and conjectural, the Kansas Supreme Court ignored the fact that this action was commenced under the Kansas Declaratory Judgment statute (Appendix G), which expressly grants Courts jurisdiction to determine the validity of a state statute, and provides that:

> "This act is declared to be remedial; *its purpose is to afford relief from the uncertainty* and *insecurity attendant upon controversies over legal rights, without requiring one of the parties interested so to invade the rights asserted by the other as to entitle him to maintain an ordinary action therefor; and it is to be liberally interpreted and administered,* with a view to making the courts more serviceable to the people." (Sec. 60-3132, Appendix G).

In this action it is proper to ascertain what *may be* required under the statute. The parties are not limited to evidence of what *has been done* under the statute. See 16 Am. Jur. 2d, *Constitutional Law*, Sec. 151; *Montana Company* v. *St. Louis*

Mining & Coal Co., 152 U.S. 160, 38 L. ed. 398 (1892); *Gilbert* v. *Matthews*, 186 Kan. 672, 685, 352 P. 2d 58 (1960); *State Association of Chiropractors* v. *Anderson*, 186 Kan. 130, 135, 348 P. 2d 1042 (1960).

When appellants attacked the constitutional validity of Section 2 of S. B. 253, K.S.A. 41-1112, as violating the Commerce Clause, the effect and application of the statute were the prime considerations. This Court has itself often inquired into the effect of a statute upon interstate commerce in cases arising from declaratory judgment or injunctive actions, *e.g.*, *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, 95 L. ed. 329 (1951); *Parker* v. *Brown*, 317 U.S. 341, 87 L. ed. 315 (1943); *Currin* v. *Wallace*, 306 U.S. 1, 83 L. ed. 441 (1939); *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 80 L. ed. 1160 (1936), and it should do so in this case, where the certified transcript contains all the testimony and evidence introduced to the trial Court, and upon which the trier of fact found and concluded that Section 2 of S. B. 253 was an unreasonable regulation of interstate commerce.

In this and prior cases, the Kansas Supreme Court has asserted that under the Twenty-First Amendment the state may exercise its police power with respect to alcoholic liquor in any manner, free from all restraints, i.e., *"unfettered"* by the Commerce Clause or Due Process Clause, or of the remainder of the Constitution. (Appendix A, page A8). This accounts for its brushing aside, as "self-serving declarations" and as "speculative and conjectural" the facts established in this case that clearly show the extraterritorial effect of Section 2 of Senate Bill No. 253, K.S.A. 41-1112.

For, as applied by that Court, such facts would be irrelevant to the constitutionality of K.S.A. 41-1112, since no consideration need be given to the Commerce Clause or the Due Process Clause.

The Kansas Supreme Court's version of constitutional law that the state's power to regulate alcoholic liquor is "unfettered" by the rest of the Constitution, is contrary to the decisions and philosophy of this Court. The Twenty-First Amendment has not repealed the Commerce Clause or the Fourteenth Amendment. They are all parts of the same Constitution and "each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Hostetter* v. *Idlewild Liquor Corp.*, supra.

A. The New York Case and the Commerce Clause

The Kansas Supreme Court's opinion determined (Appendix A, page A9), that the constitutional issues presented in the Kansas case were decided adversely to appellants by this Court's decision in *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, decided April 19, 1966, ... U.S. ....., 16 L. ed. 2d 336, which sustained the validity of a New York "low of the lowest" liquor pricing statute. The Kansas Court's decision in this regard is completely erroneous. In fact, the constitutional issues relating to the Commerce Clause presented by the appellants in this appeal are aimed at the "open door" of the *Seagram* case.

This Court did not decide the Commerce Clause question raised in the *Seagram* case, that decision specifically left the Interstate Commerce question open for a later case,

and indicated that the New York case was premature on the extraterritorial effects of the New York statute. This Court only considered the constitutionality of the New York statutes "on their face" and stated that:

> "the present case concerns liquor destined for use, distribution, or consumption in the State of New York. In that situation the Twenty-First Amendment demands wide latitude for regulation by the state. *We need not now decide whether the mode of liquor regulation* chosen by a state in such circumstances *could ever constitute so grave an interference* with a company's operations elsewhere *as to make the regulation invalid under the Commerce Clause.* See *Baldwin* v. *G. A. F. Seelig,* 294 U.S. 511." (Emphasis added) 16 L. ed. 2d 336 at p. 342.

Then in the same paragraph, this Court continued, "It will be time enough to assess the alleged extraterritorial effects of Sec. 9 when a case arises that clearly presents them." 16 L. ed. 2d 336, at 343. Section 9 of the New York law is the "low of the lowest price" counterpart of the Kansas statute challenged in the present case, K.S.A. 41-1112.

The New York case was never tried. No witnesses were ever sworn or gave testimony, or were examined and cross-examined. The New York trial court decided the case at the preliminary stages on plaintiffs' Motion for a Restraining Order pending determination of the issues and defendants' Cross-Motion to declare the challenged sections of the New York act valid. The trial Court treated defendants' Cross-Motion as one for Summary Judgment, and directed judgment in favor of the defendants. See 45 Misc. 2d 956, 258 N.Y.S. 2d 442 (1965). By contrast, this

present Kansas case was fully litigated—issues were joined on the pleadings, trial was had, evidence was introduced, witnesses were sworn, examined and cross-examined, objections to the evidence were made, argued and ruled upon during the trial, and based thereon, findings of fact and conclusions of law were made by the trial Court, which sustained appellants' contentions that K.S.A. 41-1112 is unconstitutional.

Appellants submit that the extraterritorial effects of the Kansas statute on the Commerce Clause are clearly presented in the record of testimony, findings of fact and conclusions of law made by the trial Court after a full trial of the case which are all included in the transcript of record in this Court. This case fits squarely into the "open door" of the *Seagram* case.

B. Facts Showing the Extraterritorial Effects of K.S.A. 41-1112

Appellants submit that one who wants to test the constitutional validity of a "low of the lowest" liquor pricing statute, such as the one challenged in this case, K.S.A. 41-1112, neither has to wait until he is faced with a criminal prosecution for its alleged violation; nor until he has made allowances in other states which must be reflected in the Kansas filed price; nor until he has spent substantial sums in the promotion of a brand in another state in order to demonstrate that in doing so he has incurred a duplicating cost in Kansas in excess of that promotional cost; nor until he can show that he had embarked upon a merchandising program in another state and then abandoned it because of the duplication of cost incurred under

Section 2, K.S.A. 41-1112, by reductions in prices to Kansas distributors. A Declaratory Judgment action is entirely proper to test the validity of a statute by what may be done under and by virtue of its authority. (See Appendix G).

The facts showing the extraterritorial effect of K.S.A. 41-1112 are all contained in the transcript of this case. Although the Kansas Supreme Court did not give any consideration to the facts relating to the violation of the Commerce Clause, it made no new findings that such facts were erroneous or unsubstantial, and as previously discussed this position was probably the result of Kansas Supreme Court's erroneous premise that a state's police power to regulate alcoholic liquor is "unfettered" by the Commerce Clause. However, this Court can and should examine the facts for itself to determine the constitutional issues presented by this appeal.

In *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 89 L. ed. 1915 (1945), this Court reversed the Supreme Court of Arizona and held that the Arizona Train Limit Law was unconstitutional as violating the Commerce Clause. In *Arizona*, the state trial Court had made extensive findings of fact and held for the defendant. The Arizona Supreme Court left the findings of fact of the trial Court undisturbed and made no new findings, but reversed the trial Court by holding the state statute was within the police power despite its burden on interstate commerce. In reversing the Arizona Supreme Court, this Court stated:

> "While *this Court* is not bound by the findings of the state court, and *may determine for itself the facts of a case upon which an asserted federal right de-*

> *pends,* Hoover & A. Co. v. Evatt, supra [324 U.S. 652, 679, 89 L. ed. 1252, 1260 (1945)], and cases cited, *the facts found by the state trial court* showing the nature of the interstate commerce involved, and the effect upon it of the train limit law, [the state statute challenged] are not seriously questioned. . . . Taken together the findings *supply an adequate basis for decision of the constitutional issue.*" (Emphasis added) 325 U.S. at 771, 89 L. ed. at 1925-1926.

The certified transcript of the record in this case contains numerous examples of the extraterritorial effect of the application of the challenged statute, K.S.A. 41-1112, on interstate commerce.

Testimony of competent, knowledgeable witnesses with backgrounds of experience in the merchandising of alcoholic liquors established the facts showing that, after appellants-suppliers have sold and delivered their products to distributors in states other than Kansas, in order to move their goods from the distributor on to the retailer and then to the consumer, they make advertising, depletion and promotional allowances to some such distributors; that in that manner they buy the services of such distributors, their salesmen and organizations, "to push the sale of their products." For that they make incentive payments of various kinds, recognized as lawful merchandising practices in such other states, in return for which they get a consideration in increased sales, and, presumably, additional profits (Tr. 87, 145, 146). Should any such program reflect a price for an item sold in the other states, which is lower than the per-case, Kansas filed price, K.S.A. 41-1112 requires appellants to give that same benefit, by way of a

reduction in price to all of the Kansas distributors. The Kansas Supreme Court stated that the "legislative intent is plain," and that "* * * *all such allowances* made to purchasers, being diminishing factors of the amount actually received by the sellers, *are to be deducted and reflected accordingly, in determining that lowest price.*" (Appendix A, page A14). The Kansas distributors will not have rendered any service to appellants in connection with the sale of such products in the other states. The impact of K.S.A. 41-1112, therefore, is to require appellants to give the Kansas distributors, "something for nothing." The testimony showed that, in such instance, where appellants were forced to grant such reduced price to the Kansas distributors, that such additional promotional cost is "thrown away for nothing"; that, "we've got to get that dollar back somewhere else." (Tr. 112-113, 162, 163, 164.)

This arbitrary forced price reduction for the benefit of Kansas distributors, without consideration, either increases appellants' merchandising costs or reduces the net amount which they receive for their products sold to Kansas distributors, or both. In the operation of their businesses, inevitably, such moneys paid out or lost will have to be borne or absorbed in connection with the sale of appellants' products in states other than Kansas. That is to say, that in determining the prices at which their products shall be sold in the other states, appellants will have to add to and include in the cost-price structure with respect to such sales, the amounts of money which they have been forced to give without consideration, to Kansas distributors by way of such artificially forced price reduction (Tr. 89, 162). This is a business fact and there is

nothing conjectural or speculative about it. K.S.A. 41-1112 thus places an unreasonable burden on the conduct of their business in other states.

K.S.A. 41-1112 requires a manufacturer who makes advertising depletion and promotional allowances to distributors in states other than Kansas, in connection with his merchandising activities in such states, to assume the cost, not only of such allowances, but in addition thereto the cost of a similar allowance by way of reduction of price for the benefit of all the Kansas distributors. In other words, he is required to incur in Kansas *a duplication of his promotional cost* in the other state in order to conduct his merchandising activities in such other states (Tr. 112-113).

Should a manufacturer doing business in Kansas be confronted by a reduced price on a competitive brand in another state, and, to meet that competition he must make an allowance, and such allowance reduces the price on the item below the Kansas filed price, the manufacturer is faced with this situation: (1) he either meets the competition or foregoes the sale of his product; (2) to meet the competition he must assume the cost not only of the allowance in the other state, but also, in addition, a similar allowance by a reduction in his Kansas price for which he gets no valuable consideration or return; and (3) when he makes the allowance in the other state, his price is then lower than his Kansas filed price, which must remain firm for 90 days, and he stands in violation of K.S.A. 41-1112 and hazards the risk of prosecution for such violation.

The evidence in this case shows that the impact of Section 2 is such that:

A manufacturer could not afford to promote the sale of his brands in a "weak" market—one of nominal potential—in another state, for the reason that it would cost him several times as much by way of price reductions in Kansas; and there are such situations (Tr. 112-113, 163).

A manufacturer who has a good market for his brand in Kansas, who contemplates the development of consumer acceptance for such brand in another state where the market for it is weak, would have to give very careful consideration to the fact that whatever he did to promote the brand in such market he would also have to do in Kansas. One manufacturer testified that in this situation he might have to contribute from $1,500 to $2,500 in Kansas for an expenditure of $500 in the other state markets (Tr. 117). Another testified that in such a situation he "would have to pay Kansas distributors in order to sell" his brand in the other state, and that in the specific instance as to which the witness testified, it would be "impossible for us to make an investment in any market outside of Kansas" with a view to development of a market for straight whiskey in a state whose market for it is weak (Tr. 145).

The formula, "as low as the lowest" under K.S.A. 41-1112, has special significance to a manufacturer who may desire to introduce into the market of a state other than Kansas, either a new brand or a brand already listed in Kansas but not in the other state for these reasons: (1) the cost of initial distribution of the product among wholesalers and retailers requires a large expenditure in adver-

tising and promotion to acquaint the market and the consumer with the item; (2) for a period of time such expenditures will be excessive and such promotion requires a period of about 3 years before the manufacturer gets a return—assuming that he gets such. Consequently, the manufacturer takes a risk in the introduction of a new brand; the duplication of promotional expense required by K.S.A. 41-1112 makes it an extraordinary risk; and that would necessarily be an important factor to be considered and would affect his decision whether to launch a sales program to introduce into another state a brand not listed there and might cause him to abandon such program (Tr. 87).

It is apparent from the record that, if a supplier, who sells 5,000 cases of a brand in Kansas, annually, launches a program in another state, either to introduce that brand or increase its sales there, and in that connection makes an allowance of $1.00 per case, it will cost him $5,000 in Kansas. So if he spends $1,000 to sell 1,000 cases in the other state, it will cost him $5,000 by way of reduced prices to the Kansas distributors. And of course, as to the leading straight whiskey brand selling over 60,000 cases per year in Kansas, the promotion of that brand in a new or a weak market in another state would be prohibitive. What is speculative or conjectural in that respect?

The development and conduct of a program to penetrate, extend or increase the market for Canadian whiskey, for example, in a state where the market is weak for the product would require an extended promotional program which might cover a year or two and an annual expendi-

ture in advertising and production. The fact that such cost would have to be reflected back to Kansas on that particular item would very definitely affect the manufacturer's judgment as to what he would do with respect to carrying out such a program, and might make him abandon the program (Tr. 163).

The factual testimony described above came from witnesses experienced with respect to the subject matter, and was of a type and character which the trial Court considered to be nationally based on the perception of the witness and was helpful to an understanding of the impact of Section 2. (Rule 56, *Uniform Rules of Evidence*, Jones on Evidence, Vol. 4, p. 1935.)

Conceivably, K.S.A. 41-1112 could be complied with by making a "flat price" for the merchandise, *i.e.*, post a price which would be uniform everywhere, and low enough that under no circumstance would the product be sold at less than that price (Tr. 26, 147). However, it appears that such a price would be so absurdly low that no distiller could afford to pass the reduction on to the wholesaler, or so low that it would be more profitable not to do business in Kansas than to file such a price, and his company would not do it (Tr. 32, 147).

The evidence is clear that it was not possible to adopt a "flat price" policy and confine the results to Kansas; that distributors in other states who render services for the allowances given them, and the 17 monopoly states, as well, would take the position, and rightly so, that if the manufacturer can afford to give Kansas distributors three or four dollars a case for nothing they can afford to give

it to them, and would make demands for the same low prices, and that as a result thereof (1) the manufacturers would be compelled to give up legal marketing practices in other states and (2) Kansas would be setting the price in every other state (Tr. 145, 147, 163).

This decision by the Kansas Supreme Court is contrary to the basic principle in Commerce Clause cases that a state may not, while passing laws to control internal problems, affect by these laws, either directly or indirectly, commercial activities wholly outside of the state. *Gibbons* v. *Ogden,* 9 Wheat. 1 (1924); *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761, 89 L. ed. 1915 (1945).

A state statute, for whatever purpose designed, cannot stand when its effect and application will require one engaged in interstate commerce to gauge the conduct of his business operations in other states, or even abandon them, or to surrender the use of merchandising policies in connection with the conduct of his business operations in other states in order to comply with the laws of the legislating state, such as Kansas. See generally, *Baldwin* v. *G. A. F. Seelig, Inc.,* 294 U.S. 511, 79 L. ed. 1032 (1935); *Polar Ice Cream & Creamery Corp.* v. *Andrews,* 375 U.S. 361, 11 L. ed. 2d 389 (1964).

The rapid increase in the number of states enacting "low of the lowest" pricing statutes that require the price to be filed in the legislating state be determined and calculated by activities taking place in other states will completely disrupt the interstate business of alcoholic liquor suppliers and make compliance with all of these state laws impossible. Under the statutes Kansas looks to New York

or Massachusetts or some other "lower" price state to determine the Kansas price, while New York and Massachusetts at the same or later or prior time look to Kansas or some other "lower" price state to determine their local prices. It is not speculative to assert that these state laws acting together could "lock" or "freeze" prices at a particular level. It is entirely probable that a supplier would not be able to comply with one state's laws because they were attempting to comply with another state's laws; and when a supplier attempted to raise prices in one state there is great likelihood that he would be violating another state's "low of the lowest" law because of conflicting time sequences for determining the local price. The Twenty-First Amendment certainly should not permit and cannot validate such a morass of conflicting and onerous legislation to burden the free flow of interstate commerce.

POINT III

The Effect and Terms of K.S.A. 41-1112 Together with the Rules and Regulations Implementing It in Conjunction with K.S.A. 41-1121 Violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution by Being Vague and Indefinite.

The Kansas Act under consideration not only contains a current price filing which shall be as "low as the lowest price" elsewhere, K.S.A. 41-1112 (Appendix D), which was implemented by Director's Memorandum No. 61-48 (Appendix F), by requiring a sworn statement that the prices filed meet the requirements of K.S.A. 41-1112, but it also contains criminal penalties. Section 11 of Senate

Bill 253 (K.S.A. 41-1121, Appendix D) provides: "Any person violating any of the provisions of this Act shall be guilty of a misdemeanor, and upon conviction thereof shall be punished as provided by law." Thus, Section 11 of the Act, just quoted, makes the violation of any provisions of the Act a misdemeanor, without requiring criminal intent and without defining with exactness the act forbidden. This criminal sanction applies to appellants when they try to comply with the "low of the lowest" price filing requirements and calculations of Section 2 of Senate Bill 253, K.S.A. 41-1112.

Since a violation of the requirements of K.S.A. 41-1112 is punished as a misdemeanor, it is obvious that K.S.A. 41-1112 must not be vague and indefinite in its terms and application. In order to satisfy the constitutional requirements of due process a state statute must be sufficiently explicit in its description of the acts, conduct or conditions required or forbidden, to prescribe the elements of the offense with reasonable certainty. Men of common intelligence cannot be required to guess at the meaning of a statute. *Connally* v. *General Construction Co.*, 269 U.S. 385, 70 L. ed. 322 (1926); *United States* v. *Cardiff*, 344 U.S. 174, 97 L. ed. 200 (1952); *State* v. *Hill*, 189 Kan. 403, 369 P. 2d 365 (1962). The standards of certainty in a statute with criminal sanctions is *higher* than in those depending primarily upon civil sanction for enforcement. Note, *Due Process Requirements in Statutes*, 62 Harv. L. Rev. 77 (1948); see *Winters* v. *New York*, 333 U.S. 507, 515, 92 L. ed. 840 (1947).

A. The New York Case and the Vague and Indefinite Issue

Contrary to the Kansas Supreme Court's opinion, this Court's decision in *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, supra, does not answer the vague and indefinite issue presented in this appeal. In the *Seagram* case, the only part of the New York statute challenged as vague and indefinite in this Court was the phrase "related person." 16 L. ed. 2d 336 at 346. That phrase does not even appear in the Kansas Act. Furthermore, the fact that the terms of the New York statute were found not to be vague and indefinite does not mean that the terms of the Kansas statute are not vague and indefinite.

The main thrust of appellants' argument that the Kansas statute, K.S.A. 41-1112, is vague and indefinite points to the impossibility of ascertaining from the statute how the statutory terms can be translated into a definite dollars and cents current price because the Kansas statute, unlike the New York statute, does not provide any "time period" upon which to base a price calculation for filing a current price. The New York statute before this Court in *Seagram* requires *monthly* price filings accompanied by an affirmation that the files price is no higher than the lowest price at which sales were made during the *preceding month* (Appendix A, page A9). By contrast, the Kansas statute, K.S.A. 41-1112 (Appendix D), requires the appellants to take into consideration all advertising, depletion and promotional allowances and rebates of every kind whatsoever *made* to purchasers in such other state, when appellants are determining their "low of the lowest price" for filing in Kansas.

The Kansas statute does not say "made in the preceding month, three months, or years", it just says "*made.*" There is *no time period* in the Kansas statute from which to calculate any dollar and cents current price, and without a time period, no calculation can be made (Tr. 140). The failure of the Kansas legislature to provide a time period for this calculation of a current price renders the statute, K.S.A. 41-1112, patently vague and indefinite.

Both the New York statute and the Kansas statute have criminal sanctions. The New York statute makes the filing of a "false statement" a misdemeanor; however, the Kansas statute is even more stringent. Under K.S.A. 41-1121, "any person violating any of the provisions of this act shall be guilty of a misdemeanor. . . .", therefore an erroneous calculation of a current price under K.S.A. 41-1112, may result in a misdemeanor, however innocently made since the criminal sanction does not require criminal intent for the crime.

B. Facts Showing K.S.A. 41-1112 to Be Vague and Indefinite

The record abounds with specific instances showing that the terms, application and effect of the Kansas statute, K.S.A. 41-1112, are so vague, indefinite, uncertain and ambiguous that appellants do not know and are unable to ascertain with reasonable certainty what may or may not constitute either compliance with or violation of its terms, and because of the criminal sanctions, without intent, prescribed by K.S.A. 41-1121, appellants are forced to act at the peril of being charged with criminal violation notwithstanding an honest effort to comply, should they

guess wrong as to the meaning of the vague and indefinite provisions of the statute. The trier of fact in this case, the trial court, found that the appellants "cannot make truthful sworn statements that their price lists meet the requirements of Section Two," now K.S.A. 41-1112 (Findings Nos. 27, 28, 29, Appendix B).

The provided clause of K.S.A. 41-1112, requires that in determining the lowest price for which an item of alcoholic liquor is sold in some other state, "there shall be taken into consideration all advertising, depletion and promotional allowances and rebates of every kind whatsoever made to purchasers" in such other state. Neither the phrase, "taken into consideration" nor any of the terms enumerated are defined in the statute. The Kansas Supreme Court held that these terms were not vague and indefinite since "these terms are very meaningful in the liquor industry." (Appendix A, page A14). The Kansas Court conclusion was erroneous. Since this statute has criminal sanctions it is unconstitutionally vague if "men of common intelligence" must guess at its meaning.

The evidence and testimony show that there may well be a difference of opinion as to whether certain allowances come within the statute, and if they do fit into the statute, the bases upon which a supplier can relate expenditures for allowances to his Kansas filed price (Tr. 137). Does "taken into consideration" mean only to "consider" or "deliberate" or does it mean that any such allowance shall be deducted from the then filed Kansas price, and if deducted, is the full amount deducted or only that part attributable to Kansas, if such allowance could be made in Kansas (Tr. 26, 33, 98, 137, 142, 156).

The factual proof clearly establishes that: (a) the making of allowances to distributors involves contingencies and conditions to the extent that Section 2 (K.S.A. 41-1112), and the sworn statement to accompany the price filing, will require appellants to file and certify prices, and their compliance with the statute under circumstances in which the facts upon which such are determined, are not, and cannot be, available or known to them; and (b) that a difference of opinion will exist, and with such an uncertainty, as to the basis upon which the supplier shall relate the allowances to his Kansas price, *and also* whether some come within the orbit of K.S.A. 41-1112 (Tr. 96, 99, 100, 102, 115, 139, 142, 144, 148, 155), and that in each of the above instances these appellants will be confronted with making decisions in which he risks violation of K.S.A. 41-1112 under circumstances in which he can neither know nor ascertain what may or may not constitute compliance on the one hand or violation on the other. For example, he will not know until the end of a period—say a year, how many cases of his brand were sold, how much advertising, depletion and promotional expense there has been, and, therefore, the impact on his cost per case (Tr. 142, 148, 150, 152). In the meantime, he has been required to make four sworn quarterly price filings. Has he not violated the provisions of the Act before he is in position to determine the fact constituting violation? His situation is bound to be that, an after the fact determination will show that, during sales period contingency until the end of which he cannot know whether an allowance is payable or what his per case cost will be—he will have been in

violation of K.S.A. 41-1112 because his Kansas price will not have been as low as the lowest.

K.S.A. 41-1112 will require that every marketing move made by appellants, at any place or time, with respect to any products, will require an adjustment in the Kansas filed price, and, due to the temporary nature of these merchandising allowances, the Kansas filed price will constantly move up and down (Tr. 157, 158). Under these circumstances K.S.A. 41-1112 requires appellants to file a price which will be their "current price" throughout a 90-day period, and to guarantee that nothing will happen in all this maze of marketing activities in the other states which will not make their Kansas filed prices something other than "as low of the lowest", and to do so against the risk of violating the statute (Tr. 142, 148).

The testimony shows that the variations in marketing conditions and practices with respect to alcoholic liquors, occasioned by different and variable economic conditions in, and the laws and regulations of, the several states; the price changes brought about by competitive conditions; the making of sales and promotional allowances of various kinds, under varying circumstances, in various places, in the day by day transactions in the hundreds of markets in the United States, the constant price changes resulting therefrom; the making of such allowances by persons at regional, division and state levels, to whom managerial responsibility has been delegated due to the necessity of meeting competitive conditions; the accounting procedures, and the time factors involved in processing information as to allowances to the principal offices of plaintiffs where

the records and accounts are maintained; and the fact that information with respect to such allowances, in so many instances, is neither known nor susceptible of being known, currently, when the obligation to file prices confronts the manufacturer, and to the only persons who are qualified to verify compliance with K.S.A. 41-1112; give rise to uncertainties which make it impossible for appellants to know or to calculate with any degree of accuracy the price required to be filed by K.S.A. 41-1112, either on June 20, 1961, or on any other given date (Tr. 98-99, 103, 106, 114-115, 125-127, 130-131, 136-139, 142, 143-144, 149, 150-152. 156-158).

Since Section 1 of Senate Bill 253, K.S.A. 41-1111 (Appendix D) measures the Kansas price against that at which the item *is sold to distributors*, and Section 2 of the Act, K.S.A. 41-1112, against that for which it is sold anywhere *in any state*, appellants are uncertain as to whether they are required to take into consideration the prices at which they sell to the "Monoply" states. This uncertainty arises because appellants sell their products *in* the "open states" but sell *to* the "monopoly states," not *in* such states. The Kansas Supreme Court held there was no vagueness in this respect and that appellants are required to consider the "monopoly state" prices, because, "In monopoly states the state is the distributor." (Appendix A, page A13). This statement has no bearing on the uncertainty of the Kansas Act, because under the Kansas Liquor Control Act, the word "distributor" does not embrace a sovereign state. Under the definition section of the Kansas Liquor Control Act, K.S.A. 41-102(8), distributor means, "the person, as hereinafter defined, importing or causing to be imported

into the state, or purchasing or causing to be purchased within the state, alcoholic liquor for sale or resale to retailers licensed under this Act." Under K.S.A. 41-102(13) "the person" as used in the Act, "includes any natural person, corporation, partnership or association." It should be noted that the New York statute before this Court in the *Seagram* case, supra, did not contain any of these uncertainties about monopoly state prices. The New York statute provides that the price filed in New York be no higher than the lowest price at which said item was sold, ". . . to any wholesaler anywhere *in* any other state . . . or *in* the District of Columbia, or *to* any state (or state agency) which owns and operates retail liquor stores . . ." (Emphasis added). *McKinney's Consolidated Laws of New York*, Book 3, Article 8, Section 101-b (3) (d).

Other examples of factual instances and examples showing the vague, indefinite, uncertain and ambiguous terms, effect and application of the challenged statute are in the certified transcript of record at pages: 25, 26, 99, 116, 127, 139-140, 142, 156, 157, 158.

POINT IV

The Application and Effect of K.S.A. 41-1112 Violates the Due Process Clause of the Fourteenth Amendment As an Arbitrary and Unreasonable Exercise of the Police Power with No Relationship to Proper Police Power Motives.

Appellants recognize the undeniably broad power that Kansas has, in the exercise of its police power, to regulate and control the alcoholic liquor business. This appeal in this respect does not question the power of the state; only the validity of its exercise.

There are certainly constitutional limitations on the exercise of a state police power over alcoholic liquors. As previously discussed, the Kansas Court is wrong in its premise that the state's power under the Twenty-First Amendment is "unfettered" by the Due Process Clause, since this Court stated in the *Idlewild* case, supra, that the parts of the constitution are to be considered "in the light of each other." The exercise of police power must always be "reasonable and not arbitrary or capricious." 16 Am. Jur. 2d, *Constitutional Law*, Sections 277, 279, 280.

When the exercise of a state's police power is questioned, a Court must determine whether the *problem* is one which is subject to control for the public good and welfare and then it must also determine whether the *means chosen* by the legislature are reasonably designed to accomplish the *purpose* of the Act, *i.e.*, are its terms arbitrary, discriminatory, or demonstrably irrelevant to the legislative policy. See *State* v. *Consumers Warehouse Market*, 183 Kan. 502, 329 P. 2d 638 (1958); *Nebbia* v. *New York*, 291 U.S. 502, 78 L. ed. 940 (1934).

More recent decisions of this Court have indicated that a state statute will fall on substantive due process grounds where no police purpose is being served. See *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594-595, 8 L. ed. 2d 130, 133-134 (1962); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488, 99 L. ed. 563, 572 (1955).

Appellants believe that the factual testimony in this case shows the arbitrary and unreasonable impact of K.S.A. 41-1112 on the business being regulated, and inter alia, that the means adopted by the legislature in K.S.A. 41-1112

have no reasonable relation to, nor are they designed to accomplish, the purposes of the Act as stated in Section 1 of Senate Bill 253, K.S.A. 41-1111.

A distributor doing business in one state is not in competition with a distributor in another state. There is no relationship between the price at which a manufacturer sells alcoholic liquors in any state other than Kansas and the price at which he sells to Kansas distributors; nor to the type or kind of places at which, nor the character of the surrounding conditions and circumstances under which, such are sold in Kansas; nor to violations of law in Kansas arising out of the excessive use of intoxicants; nor to "price-cutting" or "cut-throat competition"; nor to the social, moral and economic problems as evils attendant upon the alcoholic liquor traffic in Kansas (Tr. 82, 83-84, 85, 88, 91, 120, 121, 125, 135, 137, 140, 155, 159, 161, 162). Consequently, K.S.A. 41-1112 is a price fixing measure which has no clear, real or substantial connection with and does not in some plain, appreciable and appropriate manner tend to accomplish the purposes stated in Section 1 of the Act, K.S.A. 41-1111, to wit, in the public interest and in order to promote the orderly sale and distribution of alcoholic liquor, to foster temperance and promote the public welfare (Finding of Fact Nos. 19, 20, 21, Appendix B).

The different and varying economic conditions and the varying rules and regulations in the several states, with respect to alcoholic liquors, present factors in the merchandising and pricing of the sales of such products in states other than Kansas which have no real or substantial relationship to the price at which liquors are sold in Kan-

sas; yet, under K.S.A. 41-1112, they are to become a factor in the determination of the "low of the lowest" price required under K.S.A. 41-1112 to be filed in Kansas (Findings of Fact Nos. 16 to 22, Appendix B).

K.S.A. 41-1112 makes no allowance for the different and various cost factors which have no relationship to sales made to Kansas distributors; nor for the fact that an out-of-state supplier, in order to compete with a local supplier in his market, often sells at a price lower than he does elsewhere; and will be required to reflect that lower price in Kansas for the benefit of its distributors notwithstanding there are no local suppliers in Kansas, hence no local competitive market, and that such lower price has no relation to, support, or incident in connection with the sale of his products in Kansas (Tr. 90, 127, 140-141, 156).

The *uncontroverted testimony* in this case is that it is an economic fact that lowering liquor prices stimulates sales and consumption, whereas raising prices restricts sales and consumption and that "minimum price" regulation accomplishes the purpose of avoiding undue sale and consumption, fosters temperance, and serves the public interest and welfare. A "minimum" price tells the person affected that you cannot sell liquor below a certain price. "Maximum price" regulations bring about cheap liquor prices, increased consumer sales and consumption and foster intemperance (Tr. 81, 83, 100, 115, 125, 126, 160, 162).

The Kansas Supreme Court sustained K.S.A. 41-1112 as a valid exercise of the police power by holding that there is a real relationship to a proper legislative purpose expressed in the Act—"the orderly sale of liquor," and that

it relates to the maintenance of price stability and because it is an integral part of an overall price structure for the industry (Appendix A, page A18). These conclusions are clearly erroneous in view of the facts in this case relating to the effect and application of K.S.A. 41-1112.

No Relationship to Temperance. Section 1 of the Act, K.S.A. 41-1111 adopts a "maximum price" policy for prices from a supplier to the Kansas distributors by declaring that the highest price a supplier can sell its products to a Kansas distributor is the lowest price for which it sells that product anywhere else. This "maximum" price policy is implemented by the price calculation requirements of Section 2 of the Act, K.S.A. 41-1112, by prescribing that prices filed by the supplier shall be "as low as the lowest price." However, Section 1 of the Act, K.S.A. 41-1111, also adopts a "minimum price" policy for prices from the distributor to the retailer, and from the retailer to the consumer. This "minimum price" policy is implemented by Sections 3, 4, 5 and 6 of the Act, K.S.A. 41-1113, 1114, 1115 and 1116 (Appendix D).

The "maximum" price "as low as the lowest" reduces the price to the distributor, lowers the base price upon which the Alcoholic Beverage Control Board of Review calculates the mark-up profit for the distributors and retailers under Section 6 of the Act, K.S.A. 41-1116, results in a lower price to the consumer, thus stimulates the sale and consumption of alcoholic liquor and promotes intemperance instead of fostering temperance, and this, notwithstanding the fact that Section 1 of the Act states the legislature finds that suppliers' sales prices to distributors

should be "no higher than the lowest" price, "to foster temperance." Should the Board fail to pass on to the retailer the reduction in price which K.S.A. 41-1112 gives to the distributor, then the effect of the Act would be limited to reducing the distributors' acquisition costs, which would neither accomplish a public purpose nor be a proper object for the exercise of the police power.

Price Stability and Orderly Sale. Since the price calculation required by K.S.A. 41-1112 only "pegs" the Kansas distributor's acquisition costs, by requiring the supplier to price his liquor at a price no higher than the lowest price he receives elsewhere, K.S.A. 41-1112 has no relationship to the rest of Senate Bill 253 insofar as price stability is concerned. In fact, the application and effect of K.S.A. 41-1112 will of necessity cause liquor prices to fluctuate every quarterly filing date. This is true because the "minimum" prices from distributors to retailers and from retailers to consumers are pegged to the current "maximum" prices filed and calculated under K.S.A. 41-1112.

Before a supplier files his current price under K.S.A. 41-1112, he must calculate that price, *i.e.*, determine the price, by taking into consideration all allowances and rebates *made* to other purchasers outside of Kansas. It cannot be denied that appellants are continually involved in making merchandising allowances in other states that allow them to be made and these allowances are never the same from one month to the next, many are made on the spot to meet competition and generally are of a temporary nature; therefore, every quarterly price filing will of necessity fluctuate.

After each price filing by a supplier, the acquisition costs plus mark-up of the distributor and retailer are determined and the "minimum" sales prices for the distributor and retailer are set. At the end of three quarterly price filings the distributor and retailer may well have inventories of liquor with three different minimum prices. So the corner retailer will have Old Crow inventory from the first quarter at $5.80 per bottle, second quarter of $5.40 per bottle, and third quarter of $5.60 per bottle. Under Kansas law the retailer cannot legally lower the $5.80 inventory to $5.40 because that would be less than his minimum price for that quarter; hence it is obvious that the orderly sale of liquor and the regulation of these minimum prices will be impossible.

Integral Part of Comprehensive Law. As a matter of fact, K.S.A. 41-1112 is not an integral part of Senate Bill 253 (Appendix D), since this Act has two distinct and unrelated parts. One part of this Act relates to "minimum" prices from distributors to retailers and from retailers to consumers, K.S.A. 41-1113, 1114, 1115 and 1116 (Appendix D) which would promote price stability by removing the possibility of price cutting and price wars. The other part of the Act, K.S.A. 41-1112, relates to "maximum" prices which requires a price calculation of the current price from the supplier to the Kansas distributor. K.S.A. 41-1112 of itself can only act to obtain the lowest possible price every filing period upon which to peg the "minimum" prices required under the other parts of the Act, by having the supplier's price to the Kansas Distributor be calculated after taking into consideration all merchandising allowances and rebates *made* in other states.

It is clear that Senate Bill 253 has two unrelated parts—one, K.S.A. 41-1112, lowers the liquor prices to distributors and this low price will be "reflected ultimately in the price to the consumer," as stated by the Kansas Court (Appendix A, page A18), while the other part prescribes "minimum" prices to obtain price stability.

In addition, K.S.A. 41-1112 is not an integral part of the general Liquor Control Act of Kansas. Appellants attacked only K.S.A. 41-1112 as an invalid exercise of the police power in this action; the other part of the Act relating to minimum prices has never been restrained. These minimum price sections for distributors and retailers can operate on the current prices filed by suppliers under the law prior to Senate Bill 253, which is Section (1) of K.S.A. 41-1101 (Appendix E). Appellants have continued to file price lists under K.S.A. 41-1101 ever since this action was filed in 1961.

It is paradoxical that the Kansas Supreme Court at the outset of its opinion recognized that other sections of the Liquor Control Act have the effect of completely divorcing retail sales of liquor from manufacturing and wholesaling (Appendix A, page A3), yet later in the opinion that Court sustains K.S.A. 41-1112 as an integral part of a comprehensive law governing price situations. (Appendix A, page A18).

In summary it is clear that K.S.A. 41-1112 will not and does not relate to price stability since it will create fluctuating prices every filing period. It is not an integral part of either Senate Bill 253 or of the rest of the Kansas Liquor Control Act in that the part of Senate Bill 253

relating to minimum prices will operate and has never been restrained from operating under the current prices filed pursuant to K.S.A. 41-1101. If K.S.A. 41-1112 is motivated by fostering temperance, it is the first statute ever passed to foster temperance by lowering liquor prices. There is no valid legislative motive to justify the exercise of the police power to be found anywhere in or around K.S.A. 41-1112. It is therefore unconstitutional and invalid.

POINT V

The Application of K.S.A. 41-1112 Operates As a Taking of Appellants' Property Without Due Process of Law in Violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The application and effect of K.S.A. 41-1112 is to force appellants to give something of value for which they receive nothing, and to give the Kansas distributor something of value for which he gave nothing, which constitutes the taking of appellants' property without due process of law.

One of appellants, for example, makes a promotional allowance of $1.00 per case to a distributor in California in connection with the sale in that state of one of his brands of liquor. At that time his Kansas filed price is $30.00 per case. K.S.A. 41-1112 requires that in determining what is the "lowest price" against which his Kansas price is to be measured, such an allowance shall be taken into consideration. That means that appellants' Kansas price must be reduced from $30.00 to $29.00 per case. Five days later, appellant sells a distributor in Kansas an order of that brand at $29.00, his then Kansas filed price. It makes

no difference under K.S.A. 41-1112 that ten days later the sales promotional campaign on that brand has ended and the normal true price of $30.00 becomes the current price in California. In the meantime, appellant has sold his merchandise at $29.00 to meet the mandate of K.S.A. 41-1112.

The $1.00 per case sales promotional allowance was given to the distributor in California as an incentive to get the distributor there to push the sale of 500 cases of appellant's brand. The allowance was the consideration paid to him for his services—his time, industry, effort—in getting retailers to display and push the sales of the brand. The California distributor rendered a service and appellant paid him for that service. The Kansas distributors had nothing to do with the sales made in California. They rendered no services there. But the Kansas distributor who bought for $29.00, and appellant supplier sold for $29.00, solely because required to in order to comply with K.S.A. 41-1112.

Appellants' F.O.B. listed price of $30.00 was carefully calculated. It did not include any item to cover this forced $1.00 reduction. Appellant has been required to sell his brand in Kansas at a price below its true price, not because of any incident in connection with his merchandising operations in Kansas, but solely because K.S.A. 41-1112 mandates that it be done.

It should be borne in mind that the allowance paid to the California distributor was a lawful, merchandising expenditure for services received. The forced price reduction of $1.00 per case in Kansas is an arbitrary exaction from appellant without consideration, or value.

We have here the paradoxical situation of the legislature forcing appellants to make reductions of their prices, by reason of merchandising allowances made to distributors in other states which by law it has prohibited appellants from making to them with respect to the sale of their products in Kansas.

This impact of K.S.A. 41-1112 is much more potent, in the general scheme, where "exclusive distributors" represent the appellants in states other than Kansas, whose laws do not permit them to select their own distributor. "Exclusive distributors" render extraordinary services for appellants. Many of them buy in carload lots, and secure substantial cash discounts on such volume purchases. Those must be reflected in the Kansas filed price, for the benefit of the Kansas distributors, without any consideration or value from them (Findings of Facts Nos. 18, 19, 20, 24, 26, Appendix B and Tr. 102, 108, 109, 123, 132, 152).

That the right of property is a natural, inherent and inalienable right, and that it is protected under the Fourteenth Amendment needs no recitation. Appellants believe that this forced reduction in price without consideration, by K.S.A. 41-1112 which requires appellants to give something of value, to wit, their merchandise at a price less than its true value, is a property right of which appellants cannot be deprived without due process of law. For doing so, K.S.A. 41-1112 is constitutionally vulnerable.

CONCLUSION

For the reasons stated, the questions presented in this appeal are substantial and of broad public importance and they require plenary consideration with briefs on the merits and oral argument, for their resolution. Probable jurisdiction should therefore be noted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

No. 44,423

LAIRD & COMPANY, a corporation,
and 34 other corporations,
Appellees,

v.

J. R. CHENNEY, Director of Alcoholic Beverage Control; EVERETT STEERMAN, ROBERT F. GALLOWAY and ALFRED WILLIAMS, Members of the Alcoholic Beverage Control Board of Review; ROBERT C. LONDERHOLM, Attorney General of the State of Kansas,
Appellants.

SYLLABUS BY THE COURT

The record of trial in an action brought by out-of-state manufacturers or suppliers of intoxicating liquors for injunctive relief against the enforcement of K. S. A. 41-1111 to 41-1121 relative to price control of liquor sold to licensed distributors, examined and *held,* the aforesaid statutes as construed are not violative of the due process or equal protection clauses of the fourteenth amendment to the federal constitution or the interstate commerce clause thereof, nor of the Kansas constitution on the grounds urged.

Appeal from Shawnee district court, division No. 1; BERYL R. JOHNSON, judge. Opinion filed May 7, 1966. Reversed.

Park McGee, assistant attorney general, argued the cause, and *Robert C. Londerholm*, attorney general, and *Thomas B. Root*, of Topeka, were with him on the brief for the appellants.

Harry W. Colmery, of Topeka, argued the cause, and *Robert E. Russell*, *Gerald J. Letourneau*, and *Lawrence D. Munns*, all of Topeka, were with him on the brief for the appellees.

The opinion of the court was delivered by

HARMAN, C.: At issue here is the constitutionality of certain enactments of the 1961 Kansas legislative session, now appearing as K. S. A. 41-1111 to 41-1121, and particularly K. S. A. 41-1112, relative to price control of liquor sold by manufacturers or suppliers to licensed distributors.

Brief discussion of a portion of our liquor law will be helpful in understanding the issues involved. When the legislature in 1949, in implementation of the newly adopted amendment of article 15, section 10, of the Kansas constitution, enacted laws legalizing the liquor industry, it recognized, for our purposes here, three levels of business enterprise therein, namely, (1) manufacturers or distillers or their marketing subsidiaries or distributors of alcoholic liquor bottled in a foreign country (hereinafter referred to as suppliers), (2) distributors, and (3) retailers, with licenses being required for the latter two categories and for the resident manufacturer.

In an effort to avoid certain evils associated with the liquor traffic, it determined that, unlike many other states,

there would be no authorization for exclusive distributorships and no discrimination in prices from suppliers to distributors and from distributors to retailers. This was accomplished through the adoption of that which, as now amended, appears as K. S. A. 41-1101. Subsection (1) thereof provides that it shall be unlawful for a distributor to purchase alcoholic liquor from a supplier unless the supplier shall have filed with the state director of alcoholic beverage control (hereinafter referred to as the director) a written sworn statement wherein he agrees he will sell his brands or kinds of liquor to any licensed distributor in the state at the same current price and without discrimination. The supplier is to file with the director as often as may be required but at least quarterly a list of current prices of his particular liquors to be offered. This subsection further provides that if any supplier violates his agreement by refusing to sell to any licensed distributor or by discriminating in current prices then the director shall notify all licensed distributors in this state of such violation, whereupon it becomes unlawful for the distributors to purchase liquor from such supplier and the license of any distributor making such purchase shall be revoked. Thus it is seen that instead of licensing the out-of-state suppliers the state has chosen to exert control over them by authorizing distributors to purchase only from such suppliers who are willing to comply with our price regulations. Subsection (2) contains similar provisions governing prices from distributors to retailers. Other sections of the liquor control act have the effect of completely divorcing retail sales of liquor from manufacturing and wholesaling (see, *State, ex rel.*, v. *Kansas Retail Liquor Dealers Foundation, Inc.*, 192 Kan. 293, 387 P. 2d 171).

A further step in legislative control of liquor price was taken with the enactment of Laws 1959, Chapter 217, which purported to authorize the director to fix minimum prices for sales of liquor by distributors to retailers and for sales by retailers to consumers, based on suggested price lists therefor filed by the supplier. This act was held unconstitutional upon the basis it contained two unauthorized delegations of the lawmaking power (*State, ex rel.,* v. *Mermis,* 187 Kan. 611, 358 P. 2d 936).

Thereafter the 1961 legislature enacted the provisions now under attack (Laws 1961, Chap. 241), section 1 of which (now K. S. A. 41-1111) expresses policy as follows:

> "In the public interest and in order to promote the orderly sale and distribution of alcoholic liquor, to foster temperance and to promote the public welfare, in the state of Kansas, the legislature finds: (*a*) That sales prices of alcoholic liquor sold by manufacturers and others to distributors licensed in this state should be no higher than the lowest price for which the same is sold to distributors anywhere in the continental United States; and (*b*) that minimum sale prices for alcoholic liquor sold by distributors and retailers licensed in this state should be determined and regulated by law."

Section 2 (K. S. A. 41-1112), the chief subject of this controversy, provides as follows:

> "The prices filed by manufacturers and others authorized to sell alcoholic liquors to licensed distributors, pursuant to subsection (1) of section 41-1101 of the General Statutes Supplement of 1959, shall be the current prices, F.O.B. point of shipment, and said price as filed by each manufacturer or vendor shall be as

low as the lowest price for which the item is sold anywhere in any state in the continental United States by such manufacturer or vendor: *Provided*, That in determining the lowest price for which an item of alcoholic liquor is sold in any such state there shall be taken into consideration all advertising, depletion and promotional allowances and rebates of every kind whatsoever made to purchasers in such state by the vendor."

Sections 3 to 7 (K. S. A. 41-1113 to 41-1117) provide for the fixing by the state alcoholic beverage control board of review of minimum sale prices for sales from distributors to retailers and from retailers to consumers. Sections 8 and 9 (K. S. A. 41-1118 and 41-1119) provide for the promulgation of rules and regulations necessary to carry out the provisions of the enactment. Section 10 (K. S. A. 41-1120) states legislative intent to make the act a part of our liquor control act, and finally, section 11 (K. S. A. 41-1121) provides that any person violating any provisions of the act shall be guilty of a misdemeanor and upon conviction punished as provided by law.

On May 19, 1961, the director issued a memorandum requesting suppliers to file price lists for a three month period commencing August 1, 1961, in accordance with the new enactment. On June 14, 1961, eighteen out-of-state suppliers, part of the appellees herein, filed this action for declaratory judgment and injunctive relief against enforcement of the act, and at the same time obtained a temporary order restraining enforcement of the act. Thereafter this order was modified to restrain only the requirement of price filings by suppliers under 41-1112 and the enforcement of

criminal sanctions under 41-1121. On July 14, 1961, appellants, the enforcing officers, filed an answer denying allegations of unconstitutionality. Thereafter appellants sought unsuccessfully to have the temporary restraining order vacated. Meanwhile seventeen more suppliers were permitted to become party plaintiffs in the action and to avail themselves of the temporary restraining order. Trial to the court was had December 9, 10 and 11, 1963. Appellees offered into evidence testimony in the form of depositions of officers of five appellee corporations and of a marketing consultant to the liquor industry as to the anticipated effect of the new law, along with certain exhibits concerning the liquor industry. Appellants offered in evidence copies of sworn written statements of forty-two suppliers filed with the director pursuant to 41-1112. The matter was taken under advisement and on June 27, 1964, the trial court entered its final decision, making extensive findings upholding appellees' contentions and concluding that 41-1112 is an unlawful regulation of interstate commerce by the state of Kansas in violation of the federal constitution; that the statute is arbitrary, unreasonable and capricious and in violation of the due process and equal protection clauses of the fourteenth amendment to the federal constitution and of sections 1 and 18 of the bill of rights of the Kansas constitution; that sections 41-1111 through 41-1121 violate article 2, section 16, of the Kansas constitution and are therefore void. Appellants have appealed from the judgment rendered accordingly.

Federal constitutional questions will be considered first. Appellees assert the law violates the due process and equal protection clauses of the fourteenth amendment

and the interstate commerce clause, and the trial court so ruled.

In *State* v. *Payne,* 183 Kan. 396, 327 P. 2d 1071, this court rejected similarly grounded attacks on a statute making possession of liquor upon which Kansas revenue had not been paid a criminal offense saying:

> "Pursuant to the 21st Amendment to the Constitution of the United States a state may absolutely prohibit the manufacture, transportation, importation, sale or possession of alcoholic liquors irrespective of when or where produced or obtained, or the use to which they are to be put, and may adopt measures reasonably appropriate to effectuate those inhibitions and exercise full police power in respect to them, unfettered by the due process clause, the equal protection clause or the commerce clause. This greater power to prohibit includes the lesser power to permit under definitely prescribed conditions." (Syl. ¶ 6.)

These general principles were recently reaffirmed in *Tri-State Hotel Co.* v. *Londerholm,* 195 Kan. 748, 408 P. 2d 864.

Appellees recognize the principles asserted in this line of cases but state they are to be limited to situations wherein the state control sought to be exerted is wholly local in effect and are not applicable where that control is made to extend into other states, citing federal decisions other than those cited in the *Payne* case, among which are *Hostetter* v. *Idlewild Liquor Corp.,* 377 U. S. 324, 12 L. ed. 2d 350, 84 S. Ct. 1293, and *Dept. of Revenue* v. *James Beam Co.,* 377 U.S. 341, 12 L. ed. 2d 362, 84 S. Ct. 1247.

Appellees point particularly to the proviso part of section 2—that all advertising, depletion and promotion

allowances of every kind whatsoever made to purchasers of liquor in other states shall be taken into consideration in determining the lowest price for which an item of liquor is sold in any state—and argue that the effect is the placing of an undue burden on the conduct of their business in other states. They contend these types of allowances are made in other states in consideration of certain merchandising practices beneficial to the suppliers, which are prohibited in Kansas; therefore because of the proviso, they must give the Kansas distributor "something for nothing", which loss to the supplier must be absorbed in the operations in some other states.

Appellees further argue that before attempting to meet and solve any merchandising problem in another state they are forced to consider what effect any price reduction there will have in Kansas; also, that if they are forced to grant a certain price to Kansas distributors by reason of the proviso and for which they receive no consideration, distributors in other states will expect the same preferred treatment; and they contend once having posted a price in Kansas they are required to maintain that price elsewhere for a period of ninety days or face prosecution in Kansas, and, in effect, Kansas will be setting the price of liquor in every state or the suppliers would be compelled to give up legal marketing practices in other states.

At the very least, these ingenious contentions, based on appellees' largely self-serving declarations, are speculative and conjectural as to what extraterritorial effect the law may have in the future and we think, therefore, without merit. Moreover, since this case has been submitted to this

court they have been answered unfavorably to appellees by the Supreme Court of the United States. In 1964 the state of New York enacted an alcoholic beverage control law containing provisions substantially the same as those under attack here (Chapter 531, 1964 Session Laws of New York). That law requires the monthly filing of price schedules by suppliers for liquor sales to distributors accompanied by an affirmation that the filed price is no higher than the lowest price at which sales were made anywhere in the United States during the preceding month. It also contains a price computation proviso similar to our own to the effect that in determining such lowest price all discounts, rebates, free goods, allowances and other inducements of any kind given to the distributor shall be reflected. Sixty-two suppliers attacked this law. The law successfully ran the gauntlet in the New York courts against the same challenges asserted here. (*Joseph E. Seagram & Sons, Inc.* v. *Hostetter,* 45 Misc. 2d 956, 258 N. Y. S. 2d 442; affirmed 23 App. Div. 2d 933, 259 N. Y. S. 2d 644; affirmed 16 N. Y. 2d 47, 209 N. E. 2d 701, 262 N. Y. S. 2d 75) and finally, on April 19, 1966, its validity was upheld by the Supreme Court of the United States (*Joseph E. Seagram & Sons* v. *Hostetter,* No. 545, Oct. Term, 1965, ... U. S. ....., ... L. ed. 2d ....., ... S. Ct. .....). Specifically the latter court held that under the twenty-first amendment the particular method of regulation chosen was valid on its face, the enforcement thereof having been stayed throughout the litigation, and that it does not unconstitutionally burden interstate commerce or contravene the due process or equal protection clauses of the fourteenth amendment. On the commerce aspect, which is the point principally

urged here, the court reiterated its previous position that "'a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.'" (p. .....)

Before passing to other complaints against the act we should consider appellees' evidence as to its claimed effect upon their operations. Appellees sell liquor in both open license states and monopoly states. The former are those in which the liquor business is operated as a private enterprise under state regulation through a licensing system. Monopoly states are those in which the state engages in the business of buying and selling liquor. Sales to monopoly states are in larger quantity, there being but one distributor (the state) involved, and are therefore at lower prices per unit than where there are many distributors each buying smaller quantities. Appellees, corporations of varying size and complexity of national organization, who furnish about ninety-two per cent of the liquor imported into Kansas, emphasize the highly competitive nature of their business, each competing intensely within given price ranges for consumer acceptance of his particular brands. The goal, as in any merchandising effort, is a broad horizontal base of acceptance over a wide area, extending into many or all of the fifty states, with new areas of operations being sought. In striving for this the suppliers are faced with many varied local factors, illustrative of which are competition with locally produced liquors, area and ethnic tastes or traditional preferences for particular kinds of liquor (as distinguished from brands) which results in higher volume sales of that particular kind, different methods of distribu-

tion, advertising and sales practices allowed by law in the particular area, and varying marketing conditions which never remain fixed and constant. There are others. In their efforts the suppliers are, in the language of one of the appellees' witnesses "using all of the ingenuity at our disposal within the laws of each state to promote our brands and these efforts take various forms." Concessions in price are made in order to introduce new brands. Merchandising techniques are adapted to meet local conditions. The ultimate objective of all merchandising being to get the product into the hands of the consumer, suppliers use all possible incentives and promotion devices which are aimed at the distributors, who are the key to success in moving the particular product and getting it eventually to the consumer. Suppliers would prefer a single distributor within a state for economy of operations. In some states all advertising therein on behalf of a supplier may be done by an exclusive distributor. Sales to Kansas distributors are necessarily in small quantities because of the requirement for sales to all distributors desiring to purchase. The use of incentives and allowances to distributors is a normal business practice in most of the other states. Through them the suppliers claim to "buy" the services of the distributors in moving their particular product but this is forbidden in Kansas. Suppliers who operate nationally have been forced to decentralize their business operations so that they may be able to react quickly to price changes in a particular area and remain competitive there. Managerial responsibility for price-fixing as well as for accounting is delegated to an area or regional level below a national headquarters with the result that both prices and costs are

not known at the top level of management until some time later. Constant readjustment is required. It is not always possible to compute quickly and accurately the cost of a product nationally or in a given state because of the difficulty in allocating promotion costs incurred to meet specific local problems in marketing and it is difficult if not impossible to tie certain costs to certain brands. Many of the price changes suppliers make in a particular area are only temporary in nature because conditions are constantly changing. In determining their "current prices, F.O.B. point of shipment" the factors would be total cost of original production, warehousing, bottling and preparation for market, federal and state excise taxes and a fair margin of profit to the supplier, fixed with an ultimate price in mind which would insure the greatest degree of acceptability by the consuming public.

Appellees contend, with respect to our Kansas constitution, first, that section 2 being made a criminal statute which does not require a criminal intent in doing the proscribed act, violates sections 1, 10 and 18 of our bill of rights by being vague and indefinite in its terms. As previously indicated, section 11 makes a violation of the act a misdemeanor punishable as provided by law.

Appellees urge vagueness in many respects. They profess doubt as to what states are meant by the requirement that the price filed shall be as low as the lowest price for which the item is *sold in any state*. They assert that where monopoly states are involved they do not make sales *in* the states but rather they sell *to* those states. We think the lawmakers intended no such distinction and we cannot accord any such in interpreting the statute. Its plain words

include sales in every state where liquor is furnished by suppliers, regardless of the character of the initial buyer. This conclusion is further compelled by reference to the policy statement in K. S. A. 41-1111(*a*) wherein the legislature finds sales prices in this state should be "no higher than the lowest price for which the same is sold to distributors anywhere in the continental United States." In monopoly states the state is the distributor. Appellees profess not to know whether to take into consideration prices at which they sell in the District of Columbia. The answer here seems to lie in K. S. A. 77-201, *Fifteenth*, wherein for purposes of statutory construction the term "state' is made to include the district. Appellees say they are not in doubt as to what are their "current prices, F.O.B. point of shipment" but they are uncertain as to what price is required to be filed by reason of the fact the price so filed is to remain constant and fixed for a period of ninety days and they express fear of criminal prosecution in filing an improper price because of later price changes in other states. We think appellees are unduly apprehensive as to the possible effect of the law. Certainly it does not require clairvoyance in the filing of prices nor does it impose the impossible, and appellees' liability to criminal prosecution would not depend on their ability to predict future prices successfully. The law requires filing of *current* prices. *Current* is defined in Webster's Third New International Dictionary, Unabridged, as follows:

> ". . . presently elapsing . . . occurring in or belonging to the present time . . . in evidence or in operation at the time actually elapsing . . . most recent. . . ." (p. 557.)

We think the law contemplates no more than the periodic filing of a current price as the term is commonly understood, that is, a price based upon the latest available experience at the time of computation. Subsequent events would be irrelevant to that particular filing, and the fact that the price is to be filed in advance of its taking effect and that it then remains firm for a period of time would not render later price changes in other states relevant to the validity or propriety of the previously posted price.

Appellees indicate uncertainty as to the meaning of the phrase used in the proviso in section 2 that in determining the lowest price certain kinds of allowances made to purchasers "shall be taken into consideration." However one chooses to state it, the entire section deals with the subject of a *maximum* price to be filed, that is, one as low as the lowest. The proviso is concerned only with a determination of that lowest price and not with any other degree of price. Keeping in mind the object of the statute, we think legislative intent is plain, and that what is clearly meant by the phrase in question is that all such allowances made to purchasers, being diminishing factors of the amount actually received by the sellers, are to be deducted, and reflected accordingly, in determining that lowest price.

Appellees complain that the terms "advertising", "depletion", "promotional" and "rebates of every kind" are not defined in the statute and they are therefore uncertain as to their meaning. This contention is not borne out by appellees' testimony wherein it appears that these terms are very meaningful in the liquor industry. For example, the term "depletion allowance" was described several times as one made to the distributor in consideration of his sale

to retailers within a limited time period of a certain amount of liquor already purchased by the distributor. It is a form of incentive designed to "push" the distributor in moving the particular merchandise further on in the channels of commerce. All that is meant by the terms in question is that any such allowances which are paid to the distributor and which in fact lower his price shall be reflected in the price posted in Kansas.

The degree of definiteness which a criminal statute must contain in order to meet the minimum requirements of constitutional due process has been indicated in *State* v. *Ashton*, 175 Kan. 164, 262 P. 2d 123, where this court said:

> "'A criminal statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning and differ as to its application, lacks the first essential of due process of law.'" (Syl. ¶ 1.),

On the same subject, in *United States* v. *National Dairy Corp.*, 372 U. S. 29, 9 L. ed. 2d 561, 83 S. Ct. 594 (1963), we find this:

> "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." (pp. 32, 33.)

Measured by these standards, and without further laboring the matter, we think the statute provides a reasonably definite mandate so that anyone reading it can understand what is required and what conduct is proscribed; hence the statute is not unconstitutionally vague and indefinite. In reaching this conclusion we are not unmindful of our holding in *State, ex rel.*, v. *Fleming Co.*, 184 Kan.

674, 339 P. 2d 12. Suffice it to say, the vagueness found there does not exist in the statute under consideration. The legislature here has set clear standards for determining the prices to be filed. In further support of our holding we note from the record that forty-one suppliers of liquor in Kansas, other than appellees, as well as one of the appellees, have in fact filed price lists of their brands in *prima facie* compliance with section 2 and the law is being administered as to them.

Appellees contend section 2 is an arbitrary, unreasonable and capricious exercise of the police power and that it deprives them of their property without due process of law in violation of sections 1 and 18 of our bill of rights. While recognizing the broad police power existent in liquor control, they assert that the methods adopted are unreasonable and arbitrary and bear no real and substantial relation to any legitimate object sought to be obtained. In support of this they argue that the section is in the nature of a price-fixing scheme which tends to lower the price of liquor thereby promoting intemperance. They say there is no reason why Kansas should have the benefit of lower prices existent in some other state because of marketing or local conditions which do not prevail in Kansas. In other states promotion practices are permitted whereby they are in effect permitted to "buy" the distributors' services in "pushing" their particular product, which practices are forbidden in Kansas. The Kansas distributor cannot and does not give anything of value to the supplier; therefore he should be paid nothing. Likewise, exclusive distributorships are permitted in other states or the state is the sole buyer, resulting in high volume sales, which volume price is made available in Kansas by section 2.

Underlying appellees' complaint is the fact that certain features of our law are different from that in many other states. Kansas law permits very little in the way of stimulation of liquor sales. Aggressive merchandising practices are simply not allowed. Vendors at any level do not have the right to sell liquor in Kansas through the same methods of merchandising used in the sale of soap, toothpaste or a like commodity. Any tendency toward monopoly through the use of exclusive franchises is forbidden. In Kansas it has long been recognized that alcoholic liquor "occupies a different status before the courts and the legislatures from other kinds of property" (*State* v. *Durein*, 70 Kan. 13, 80 Pac. 987) and the legislative power to regulate it is broader than the power to regulate ordinary business (*Tri-State Hotel Co.* v. *Londerholm*, 195 Kan. 748, 408 P. 2d 864).

As heretofore set forth, legislative policy sought to be effectuated in the instant enactment was expressed that in the public interest and welfare, and to promote temperance and the orderly sale of liquor, it should be sold as outlined in the statute, and that minimum prices for distributors and retailers should be determined and regulated. And as we have seen, other sections of the law do fix standards for establishing prices to be charged for liquor sold by distributors to retailers and by retailers to consumers (K. S. A. 41-1113 to 41-1117). The starting point or base for the determination of the distributor's price to retailers is the "acquisition costs" to the distributor, being his "case price" paid for liquor. This would be the same as the posted "current prices, F.O.B. point of shipment", prescribed in section 2. Keeping in mind the fact that a

price based on "point of shipment" (either the place of manufacture or of warehousing) would be the same for all shipments regardless of destination, we see nothing wrong with the requirement that the Kansas price should be as low as that for any other state, the price elsewhere being largely within the control of the supplier. The proviso so bitterly attacked simply means that such price shall be the amount actually realized by the seller on the transaction instead of an initial "invoice price" which may or may not be the true price to the distributor. (See *Joseph E. Seagram and Sons* v. *Hostetter,* No. 545, Oct. Term, 1965, ... U. S. ....., ... L. ed. ....., ... S. Ct. ....., footnote 19.) The legislature thus has declared in section 2 what the distributor's "acquisition costs" shall be, to which, in determining his price to the retailer, are to be added taxes, selling costs, cost of transportation from the "F.O.B. shipping point", any legitimate, reasonable expense incurred in the conduct of the business, and a reasonable markup or profit for the distributor (K.-S. A. 41-1116). The same statute makes similar provision for minimum prices for sales by retailers to consumers. Thus we see section 2 is not simply a price-fixing device for the benefit of Kansas distributors but it is an integral part of a comprehensive law governing price structure at all levels. Section 2 simply provides for a maximum price upon which are to be based minimum prices prescribed by other sections, thereby causing that maximum price to distributors to be reflected ultimately in the price to the consumers. Maintenance of price stability has long been considered to be in the interest of temperance and the prevention of chaos in the liquor traffic. This has been justified on the basis

that unlimited competition resulting in price-cutting and price wars leads to greater consumption of liquor as well as upon the theory that dealers faced with ruinous competition may resort to illegal sales in order to sustain themselves. If these matters be debatable, the proper forum for resolving the debate is the legislative hall (see *State, ex rel.,* v. *Sage Stores Co.,* 157 Kan. 404, 141 P. 2d 655). We note from the record that in at least some of the monopoly states the suppliers must warrant that their prices are no higher than those charged in other states. Hence, the requirement appears to be not too unusual. We think then the method used is reasonable and not arbitrary and that there is a real and substantial relation to a proper legislative purpose expressed in the act (the orderly sale of liquor) and no constitutional inhibition appears. The fact that the measure used has the effect of controlling prices does not deprive it of its essentially regulatory character. We do not sustain the act as a purely price control measure but as a police regulation asserting control over the liquor industry wherein section 2 is an integral part of an overall price structure for the entire industry. The fact that there may be some difficulty in complying with the act and even economic hardship as a result would have no bearing on its constitutionality (see *California Auto. Assn.* v. *Maloney,* 341 U. S. 105, 95 L. ed. 788, 71 S. Ct. 601).

We examine finally the contention that the act in question amends K. S. A. 41-1101 (1) and is therefore void because it does not conform to article 2, section 16, of the Kansas constitution, which insofar as pertinent provides:

> ". . . no law shall be . . . amended, unless the new act contain the entire . . . section or sections amended,

and the section or sections so amended shall be repealed."

This limitation has been held not to apply to amendments by implication or to independent acts which only incidentally restrict existing legislation (*Kimminau* v. *Common School District,* 170 Kan. 124, 223 P. 2d 689) or to legislation which is purely supplemental in character (*Ellis* v. *Kroger Grocery Co.,* 159 Kan. 213, 152 P. 2d 860). Counsel have cited many decisions of this court on this subject, and the lines are not always easily drawn therein as to whether there is amendment and repeal on the one hand or supplemental or independent legislation with resultant repeal by implication on the other. In arriving at a proper answer it may be well to keep in mind the purpose of the limitation, expressed in *State, ex rel.,* v. *Rural High-School District,* 126 Kan. 166, 267 Pac. 2, as follows:

> " 'The mischief designed to be remedied by the constitutional provision cited was the enactment of amendatory statutes in terms so blind that the legislators themselves were sometimes deceived in regard to their effect; and the public, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws.' " (p. 169.)

At 82 C. J. S., Statutes, § 260, c., p. 428, we find this:

> "Constitutional provisions requiring the setting forth of the statute as amended have never, in construction, been given a rigid effect, but have been held applicable only to such statutes as come within their terms, when construed according to the spirit of such restrictions, and in the light of the evils to be suppressed. They should receive a reasonable and

liberal construction, with the view of upholding the acts of the legislature, and not unnecessarily hampering or embarrassing it in its work. . . ."

Applying these principles to the case at bar, we cannot say that section 2 (41-1112) unconstitutionally amends 41-1101. The latter provides for the filing of lists of current prices. No effort was made to classify prices by degree or otherwise; no reference was made to a particular price and nothing was said about any "as low as the lowest." Experience with this previous law undoubtedly revealed the desirability of adding something to it; that was what was done by section 2 without changing existing 41-1101. Section 2 recites first the substance of the requirement for a filing of prices by suppliers, then elaborates as to what those prices shall be. The section is complete within itself and wholly intelligible on its face as to just what is meant. We do not think the legislators acted blindly or that they or the public were deceived by the terms of section 2. 41-1101 was not changed or modified; it is still operative and in full force and effect, as it was before the 1961 enactment supplementing it.

Upon the record before us we find no federal or state constitutional infirmity in K. S. A. 41-1111 through 41-1121. Therefore the judgment of the trial court is reversed.

APPROVED BY THE COURT.

Fromme, J., not participating.

APPENDIX B

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
First Division

LAIRD & COMPANY, a corporation, et al
Plaintiffs,
vs.
WALTER REED GAGE, Director of Alcoholic Beverage Control, et al
Defendants.
No. 89,461

Journal Entry of Judgment

Now on this 27th day of June, 1964, the above matter comes regularly on for Findings of Fact, Conclusions of Law and Judgment. The Court being fully advised in all of the facts and premises and having reviewed the law, together with hearing the arguments of respective counsel, hereby makes its decision herein, together with its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Seventeen parties joined as plaintiffs in filing this action on June 14, 1961. Thereafter eighteen additional manufacturers or suppliers were properly made parties plaintiff. Each of these plaintiffs is a "manufacturer" or "a corporate subsidiary of a manufacturer" or a "distributor of alcoholic liquor bottled in a foreign country", as those terms are used in the Kansas Liquor Control Act (CH. 41, G. S. '49 as amended).

2. Defendants occupy the positions, exercise the powers, and perform the duties with reference to enforce-

ment and administration of the Kansas Liquor Control Act as alleged in the petition.

3. This action challenges the validity and constitutionality of Senate Bill No. 253 enacted by the 1961 Legislature of the State of Kansas (L. 1961, Ch. 241, Sec. 41-1111 to 41-1121 incl.) and particularly Section 2 therof (G. S. 1961 Supp. 41-1112), together with actions taken by defendants under authority of said Act.

4. Senate Bill No. 253, supra, is by reference incorporated in these findings and made a part hereof, the same as though fully set out herein.

5. Prior to enactment of Senate Bill No. 253, the regulations adopted by the Director, as required by law, prescribed, with respect to the manufacturer's price list, that such (1) be filed by the first day of June, September, December and March (Rule 14-4-7); (2) shall be filed in the office of the Director on or before the first day of the month preceding the three months for which such price list shall be effective; (3) shall become effective on the first day of the following month and shall remain in full force and effect throughout the full three months; (4) that each price list shall be in full force and effect during the entire period of three months; (5) that the manufacturer shall forward by certified mail to each and every licensed distributor within Kansas a true copy of the price list he has filed; and (6) shall file with the Director an affidavit stating that such mailing had been done; and (7) that failure to mail such copies or to file said affidavit shall render the price list ineffective; and (8) such manufacturer so failing may be denied authority to sell alcoholic liquors to licensed distributors within the state of Kansas (Rule 14-4-12).

6. Subsequent to enactment of Senate Bill 253, the defendant, Walter Reed Gage, as Director of Alcoholic Beverage Control, on May 19, 1961, issued Memorandum No. 61-48, in which, in accordance with G. S. 1959 Supp., 41-1101, Rule 14-4-7(3), and Senate Bill 253, after setting forth the provisions of Section 2 of Senate Bill 253, demanded that plaintiffs, and each of them, desiring to do business in the state, file with him, on or before June 20, 1961, to be effective August 1, 1961, the price lists described in Section 2, and with it a sworn statement that the prices meet the requirements of Section 2.

7. An actual controversy exists between the parties to this action. It is of sufficient importance to the parties and the public in general for the Court to make a declaration in the premises. This Court has jurisdiction to make a declaratory judgment, including the constitutionality of the Statute involved and such injunctive relief, if any, as may be found proper.

8. On June 14, 1961, this Court issued an order in favor of the original seventeen parties-plaintiff restraining defendants from enforcing the provisions of Senate Bill 253. June 20, 1961, this order was modified to restrain defendants from requiring price filings from any manufacturer or distiller, or corporate subsidiary thereof; from enforcing Sections 2 and 11 of the Bill; and not prejudicing those plaintiffs in their claim of total invalidity of the Bill.

9. There was a further modification of the restraining order on May 27, 1963, by which the order was made to apply only to the original seventeen parties-plaintiff and not prevent the enforcement of Section 2 of the Bill against manufacturers not parties to the suit.

10. June 5, 1963, defendant Gage issued Memorandum 63-23 directed to "All Manufacturers and others authorized to sell Alcoholic Liquors to Licensed Distributors Within the State of Kansas" commanding them to file new price lists "within the next ten days" and submit affidavits that they "are already posting in Kansas as low as the lowest price at which the item is sold anywhere in any state within the Continental United States" and that "the new prices" "should accompany all future postings from your company".

11. After the issuance of Memo 63-23 eighteen additional manufacturers were made parties-plaintiff by proper motions granted by the Court. These additional plaintiffs were granted restraining orders protecting them from the enforcement of Section 2 and 11 of Senate Bill 253 in the same manner as the original plaintiffs.

12. G. S. 61 Supp. 41-1101 was not made a part of Senate Bill 253 nor was it repealed by it.

13. The sale and distribution of alcoholic liquors in the United States is regulated and controlled by the several states. Each state exercises that control by the licensing of distributors and retailers.

14. With respect to the marketing of alcoholic liquors, the several states of the United States are classified in two categories: The "control" or "monopoly" states, of which there are seventeen, and the "open" or "license" states, of which there are thirty-three. Kansas is an "open" state.

In the "monopoly" states, the state is engaged in the alcoholic liquor business. It buys and sells, distributes the products to the retail outlets, and establishes the price

to the consumer, based, not upon competition, but upon what it elects to take as a mark-up, to cover its cost of operation and provide a profit to the state.

In the "open" states, the business of the sale and distribution of alcoholic liquors is conducted on the free enterprise basis. The manufacturer sells and delivers to independent distributors who are licensed by the state, and who, in turn, sell and deliver to the retail outlets. Generally speaking, the manufacturer files or posts its own prices to the distributor, but the state establishes and fixes the minimum sales prices of the distributor to the retailer, and of the retailer to the consumer.

15. It is a generally recognized and accepted situation in the industry, of long standing, that the manufacturer sells alcoholic liquors to the "monopoly" states at prices which are lower than those at which he sells to the distributors in the "open" states.

In contrast, in the "open" states, the manufacturer sells to many independent distributors, who in turn sell and deliver to retailers; there are many more separate sales, in much smaller quantities; the distributors sell in competition with each other; advertising and promotional expenses are necessarily incurred in the merchandising to achieve the same distribution as is automatically accomplished in the "monopoly" states. By reason of these incidents the selling costs, advertising, promotional and other administrative expenses are higher than in the "monopoly" states.

16. The "F.O.B. point of shipment" price required by Section 2 of Senate Bill 253 represents the cost of the product at distillery or warehouse ready to ship to pur-

chaser. The factors determining this price are:—(a) Total cost of original production, (b) warehousing, (c) bottling and preparation for market, (d) federal and state excise taxes, (e) gross margin of profit, including a fair margin of profit to the company. Part of the final F.O.B. price results from the manufacturer's survey of the status of the market respecting brands and labels with which his product competes, so that his ultimate price will insure the greatest degree of acceptability by the consuming public.

17. After the product leaves the point of shipment the factors comprising the "delivered" cost to the distributor are essentially the F. O. B. price plus transportation costs, which vary by distance, volume or tonnage, plus state and other local taxes.

18. When a manufacturer sells his product to a Kansas distributor at the "F.O.B. point of shipment" price, and the distributor pays for it, the distributor owns the item, and has the responsibility of selling it. The Kansas distributor sells only to his market in Kansas. Distributors in other states sell to the markets in their respective states. There is no competition between distributors in the several states. The price at which an item is sold to a distributor in any other state has no bearing upon the price at which it is sold to a Kansas distributor or vice versa.

19. If a manufacturer sells an item to a distributor in any other state for a price lower than his filed-price in Kansas for the same item, he is required by Section 2 of Senate Bill 253 to reflect that lower price in his Kansas list, even though it was not the result of any change in the F.O.B. price to the Kansas distributor, or change in freight

rates, or the amount of taxes to be paid, or any change in any other factor in merchandising the product to the Kansas distributor, but due entirely to the requirements of Section 2.

20. Section 2 of Senate Bill 253 does not take into consideration the factors outlined in Findings 16 and 17, supra, as to the determination of the F.O.B. price point of shipment. The price pattern established by this Section is artificial and unrealistic.

21. Section 2 is a price-fixing measure which does not relate to the general purposes of the Alcoholic Liquor Control Act.

22. Competition in the sale and distribution of alcoholic liquors is intense between manufacturers and others who sell, and also between brands. The methods used by manufacturers in determining prices at which they sell to distributors vary widely. In the final analysis the consumer sets the price and manufacturers establish prices acceptable to the purchasing public.

23. The consumer market is influenced by state laws and regulations reflecting wide variations in the attitudes in the several states. At one extreme there is the state policy which treats the liquor business no different from the grocery business and permits free competition. At the other extreme is the state policy which fixes prices and mark-ups that are made inflexible by law under authority delegated to a board.

24. Normal marketing practices, such as point of sale, advertising, promotional and depletion allowances and inducements to stimulate sales, are prohibited in Kansas.

Kansas prohibits the use by manufacturers of an exclusive distributor who might promote the sale of his products, as can be done, generally in other states.

25. A manufacturer does not have a constant, fixed market throughout the United States. Many different conditions and problems require that he revamp, adjust and balance his marketing, merchandising and advertising plans, programs, and activities, because of changes in consumption of certain liquors for certain areas, or seasons of the year, or rapid growth in popularity of certain items, et cetera.

26. Merchandising practices permitted in other states are prohibited in Kansas. In Kansas plaintiffs are forced to give distributors the benefit of allowances lawfully made to distributors in other states and to reflect them in the Kansas filed-price because of the provision of Section 2 of Senate Bill 253.

The provision in Section 2 of Senate Bill 253 that sales prices "should be no higher than the lowest price for which the same is sold to distributors anywhere in the continental United States" forces plaintiffs to surrender their right to freely engage in interstate commerce. It is an imposition by the state of Kansas of an undue, unreasonable and arbitrary burden upon interstate commerce.

27. By the law and the regulations of the Director plaintiffs are required to file schedules of prices each three-month period of the year. These prices remain in effect for the entire time of each three-month period. During any given three-month period changes in marketing conditions in some other state might lower the price of a certain item, resulting in the Kansas list-price not being the

"low of the lowest" price that plaintiff would be selling his product for anywhere in the continental limits of the United States.

28. With the posting of the schedules of prices each plaintiff is required to file a sworn statement that the prices listed "meet the requirements of Section Two." Thus when situations arise as set out in Finding 27, supra, any such plaintiff would be in violation of the provisions of the Act and subject to conviction for a misdemeanor as provided in Section 11.

29. Plaintiffs cannot make truthful sworn statements to which reference is made in Finding 28, supra.

30. Upon the date of the trial of this case forty-one companies in the continental limits of the United States had complied with the Kansas law. There is no evidence that the sworn statements of any of these companies were checked either for accuracy or truthfulness.

CONCLUSIONS OF LAW

I. Section 2 of Senate Bill 253 (G. S. 61 Supp. 41-1112) is unconstitutional and void in the following respects:—

(a) It is arbitrary, unreasonable and capricious.

(b) Its enforcement will deprive plaintiffs of their liberty and property in violation of the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States and Section 1 and 18 of The Bill of Rights of the Constitution of the state of Kansas.

II. Section 2, supra, is an unlawful regulation of interstate commerce by the state of Kansas, in violation of Section 8, Article 1 of the Constitution of the United States.

III. Senate Bill 253 (G. S. '61 Supp. 41-1111 to 41-1121, incl.) violates Article 2, Section 16 of the Constitution of the State of Kansas and is therefore unconstitutional and void.

IV. The rules and regulations of defendants, and each of them, based upon Senate Bill 253, are arbitrary, unreasonable and capricious and therefore void.

DECISION OF COURT

Judgment is hereby declared in favor of plaintiffs and against defendants in accordance with the prayer of plaintiffs' petition.

Costs are assessed against defendants in favor of plaintiffs.

/s/ Beryl R. Johnson
Judge of the District Court

APPROVED:

/s/ Harry W. Colmery
Of Colmery & Russell
Attorneys for Plaintiffs

/s/ W. B. Kirkpatrick
For the Attorney General
Attorney for Defendants.

APPENDIX C

Dist. Court No. 89,461 No. 44,423

SUPREME COURT,)
) ss.
STATE OF KANSAS,)

The State of Kansas, to the District Court within and for the

County of Shawnee Div. I in the State of Kansas, Greeting:

WHEREAS, In a certain civil action lately pending before you, wherein Laird and Company, a corporation, and 34 other corporations, were plaintiffs and J. R. Cheney, Director of Alcoholic Beverage Control; et al were defendants a judgment was rendered by you against the said defendants from which judgment said defendants prosecuted an appeal in the Supreme Court within and for the State of Kansas;

AND WHEREAS, at the May Session of the January Term of said Supreme Court, A.D. 1966, on consideration of the said appeal it was ordered and adjudged by the said Supreme Court that the judgment of the District Court be Reversed and that the said defendants-appellants recover against the said plaintiffs-appellees Dollars for their costs herein expended and have execution therefor.

You ARE THEREFORE COMMANDED, That without delay you cause execution to be had of the said judgment of the Supreme Court, according to law.

Costs of	
Fees of Clerk Supreme Court	35.00*
*Record of defendants-appellants	1,559.50
*Transcript of defendants-appellants	35.00
*Other costs "Exhibits"	698.95
Total	$2,328.45

WITNESS my hand and the seal of said Supreme Court affixed hereto, at my office, in the City of Topeka, on the 16th day of August A.D. 1966.

*NOTICE: Pay costs of abstracts and other items, except costs of Clerk of Supreme Court, direct to proper parties.

/s/ James R. James
Clerk of the Supreme Court.

*Clerk's Fees paid; pay the entire sum of $2,328.45 direct to proper party.

APPENDIX D

Kansas Statutes Annotated

41-1111. Regulation of sales prices of alcoholic liquors sold by manufacturers, distributors and retailers; legislative findings. In the public interest and in order to promote the orderly sale and distribution of alcoholic liquor, to foster temperance and to promote the public welfare, in the state of Kansas, the legislature finds: (a) That sales prices of alcoholic liquor sold by manufacturers and

others to distributors licensed in this state should be no higher than the lowest price for which the same is sold to distributors anywhere in the continental United States; and (*b*) that minimum sale prices for alcoholic liquor sold by distributors and retailers licensed in this state should be determined and regulated by law. [L. 1961, ch. 241, § 1; April 10.]

41-1112. Same; prices filed by manufacturers and others to be as low as in any other state; determination. The prices filed by manufacturers and others authorized to sell alcoholic liquors to licensed distributors, pursuant to subsection (1) of section 41-1101 of the General Statutes Supplement of 1959, shall be the current prices, F.O.B. point of shipment, and said price as filed by each manufacturer or vendor shall be as low as the lowest price for which the item is sold anywhere in any state in the continental United States by such manufacturer or vendor: *Provided*, That in determining the lowest price for which an item of alcoholic liquor is sold in any such state there shall be taken into consideration all advertising, depletion and promotional allowances and rebates of every kind whatsoever made to purchasers in such state by the vendor. [L. 1961, ch. 241, § 2; April 10.]

41-1113. Same; prices filed by distributors to be not less than minimum established by board. The prices filed by a licensed distributor pursuant to subsection (2) of section 41-1101 of the General Statutes Supplement of 1959, shall be not less than the minimum sales prices established by the state alcoholic beverage control board of review pursuant to the provisions of this act. [L. 1961, ch. 241, § 3; April 10.]

41-1114. Same; fixing minimum retailer sales prices by item. The board shall establish and fix minimum prices for which an item of alcoholic liquor may be sold by a retailer licensed in this state to consumers. [L. 1961, ch. 241, § 4; April 10.]

41-1115. Same; determining minimum distributor and minimum retailer sales prices. The board, in exercising its powers and duties under the provisions of this act, shall establish and determine: (*a*) The minimum "case prices" and the minimum "bottle sale prices" from distributor to retailer; and (*b*) the minimum "case prices," the minimum "bottle sale prices," and the minimum "mixed case sale prices" from retailer to consumer. [L. 1961, ch. 241, § 5; April 10.]

41-1116. Same; prices to be fair and in public interest; guides. The prices so established and fixed by the board shall be fair and reasonable to licensed distributors, licensed retailers, and the ultimate consumer. Said prices must be in the public interest and such that they do not unduly stimulate the sale and consumption of alcoholic liquor or tend to disrupt the orderly sale and distribution of alcoholic liquor. The board in establishing and fixing such sales prices shall take into consideration and be guided by the following: (*a*) The acquisition costs to licensed distributors and retailers. The acquisition costs shall be the "case price" to distributors and the "minimum bottle sale price" to retailers; (*b*) federal, state, and local taxes and license fees paid by distributors and retailers which are levied or imposed in connection with their business of distributing or selling alcoholic liquor in this state; (*c*) selling costs of

licensed distributors and retailers; (*d*) cost of transportation to distributors from the F.O.B. shipping point to a base point in the state of Kansas; and delivery charges in connection with the shipment of alcoholic liquor; (*e*) any legitimate, reasonable expense not hereinbefore specified, incurred in the legal conduct of their businesses as licensed distributors and retailers; and (*f*) a reasonable markup or profit for the licensed distributors and retailers. [L. 1961, ch. 241, § 6; April 10.]

41-1117. Same; filing copy of prices with director; publication; copies to distributors, retailers and suppliers; fees for printing and mailing; effective date of prices; permit to sell at less than minimum prices, when. Whenever the board shall establish and fix minimum distributor or minimum retailer sales prices, it shall immediately file a copy thereof with the director. The director, from time to time, and at least once in each quarter of each year, shall publish the prices so determined and fixed, and shall promptly mail a copy to each licensed distributor and retailer and each supplier authorized to do business in this state. All manufacturers and others who have filed their prices with the director and board shall be chargeable with a reasonable fee for the printing and mailing of the prices published by the director. Such prices shall become effective at twelve (12) o'clock midnight of the seventh (7th) day following the day the same are mailed to licensed distributors and retailers. On and after the effective date of said minimum sales prices, no distributor or retailer shall sell, directly or indirectly, any alcoholic liquor listed in the then currently effective applicable schedule of mini-

mum sales prices as published by the director at less than its listed price without first having obtained from the director a permit so to do; and the director is authorized to issue such a permit in the following cases:

(*a*) Where the item of alcoholic liquor was actually possessed by the distributor or retailer prior to the effective date of the initial fixing of the minimum sales price of the item;

(*b*) where the distributor or retailer is actually closing out his stock for the purpose of completely discontinuing sale of such item of alcoholic liquor for a period of not less than twelve (12) months;

(*c*) where the item of alcoholic liquor is damaged or deteriorated in quality and notice is given to the public thereof; or

(*d*) where the sale of the item of alcoholic liquor is by an officer acting under the order of any court. [L. 1961, ch. 241, § 7; April 10.]

41-1118. Same; rules and regulations by board; employees; information. The board may adopt and promulgate such rules and regulations as may be necessary to carry out the intent and purposes of this act, and may employ such assistants and employees as it deems necessary in carrying out the provisions of this act and the compensation and expenses of such employees shall be paid in like manner as other employees of the office of the director. The board may require manufacturers, distributors and retailers to furnish any necessary information for its use in determining fair and reasonable sales prices of alcoholic

liquors in carrying out the intent, purposes, and provisions of this act. [L. 1961, ch. 241, §8; April 10.]

41-1119. Same; rules and regulations by director. The director, with the approval of the board, may adopt and promulgate such rules and regulations as shall be necessary for the administration and enforcement of the sales prices determined and fixed under the provisions of this act. [L. 1961, ch. 241, § 9; April 10.]

41-1120. Same; act supplemental to liquor control act. This act is and shall be construed as supplementary to and part of the Kansas liquor control act, and shall not be construed as repealing any law not specifically repealed by this act. [L. 1961, ch. 241, § 10; April 10.]

41-1121. Same; penalties for violations. Any person violating any of the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof shall be punished as provided by law. [L. 1961, ch. 241, § 11; April 10.]

Articles 12 to 26.—Blank. (Reserved for Future Use.)

APPENDIX E

Article 11.—MISCELLANEOUS PROVISIONS

41-1101. Discrimination in sales and prices unlawful; statement to be filed; duties of director; exception. (1) It shall be unlawful for any distributor licensed under this act to purchase any alcoholic liquor from any manufacturer, or corporate subsidiary of any manufacturer who markets his products solely through a subsidiary or subsidiaries, rectifier, distiller or fermenter or from a

distributor of alcoholic liquor bottled in a foreign country either within or without this state, unless such manufacturer, corporate subsidiary of a manufacturer who markets his products solely through a subsidiary or subsidiaries, distiller, rectifier or fermenter or such distributor shall file with the director a written statement sworn to by him, or, in case of a corporation, one of its principal officers, in which he agrees that he will sell any of the brands or kinds of alcoholic liquor manufactured or distributed by him to any distributor licensed in this state and that such sales will be made to all such licensed distributors in this state at the same current price and without discrimination and that price lists showing the current prices will be filed by him in the office of the director as often as may be necessary or required by the director but at least once each three months; and if any such distiller, manufacturer, corporate subsidiary of a manufacturer who markets his products solely through a subsidiary or subsidiaries, rectifier or fermenter or such distributor making such agreement shall violate such agreement by refusing to sell to any licensed distributor in this state or shall discriminate in current prices among such licensed distributors making or attempting to make purchases of alcoholic liquor from him the director shall notify, by registered mail, each licensed distributor in this state of such violation, and, thereupon, it shall be unlawful for a licensed distributor in this state to purchase any alcoholic liquor from such manufacturer, corporate subsidiary of a manufacturer who markets his products solely through a subsidiary or subsidiaries, distributor, distiller,

rectifier or fermenter violating such agreement, and if thereafter a licensed distributor shall purchase any alcoholic liquor from any such manufacturer, corporate subsidiary of a manufacturer who markets his products solely through a subsidiary or subsidiaries, distributor, distiller, rectifier or fermenter his license shall be revoked by the director: *Provided,* That if any manufacturer, corporate subsidiary of a manufacturer who markets his products solely through a subsidiary or subsidiaries, rectifier, distiller or fermenter or distributor of alcoholic liquor bottled in a foreign country making any such agreement shall not have a sufficient supply of alcoholic liquor of any of the brands or kinds which he manufactures or distributes to supply the demands of all licensed distributors, he may ration such alcoholic liquor and apportion the available supply among the licensed distributors purchasing or attempting to purchase the same, but such rationing and apportionment shall be in accordance with a plan which shall be subject to the approval of the director: *Provided further,* That the provisions of this subsection relating to the filing of price lists with the director shall not apply to any manufacturer with respect to alcoholic liquor manufactured or bottled in a foreign country.

APPENDIX F

OFFICE OF DIRECTOR OF ALCOHOLIC BEVERAGE CONTROL

THE STATE (Seal) OF KANSAS
WALTER REED GAGE, Director
State Office Building
Topeka

MEMORANDUM No. 61-48

May 19, 1961

TO: All Suppliers Authorized to do Business in Kansas

FROM: Walter Reed Gage, Director

SUBJECT: Price Postings filed by Suppliers with the Kansas Director of Alcoholic Beverage Control

In accordance with G. S. Kans. 1959 Supplement, 41-1101, Alcoholic Beverage Control Rule 14-4-7 (3), and Senate Bill 253 recently enacted by the Kansas Legislature, you are advised as follows in regard to the price posting requirement in Kansas.

Pursuant to G. S. Kans., 1959 Supplement, 41-1101, all suppliers shall revise their price posting as follows: Said posting will contain a complete description of the alcoholic liquors to be offered for sale to Kansas licensed distributors. Such description shall include brand name, type of beverage, container size, number of containers in each case, proof of all alcoholic liquors, except wine and champagnes. Price

lists of all wines and champagnes shall list the alcoholic content rather than proof. The container size for all alcoholic liquors shall be in compliance with the container sizes specified in Rule No. 14-6-2 as amended, of the Rules and Regulations.

The prices so filed by the supplier with the director's office shall be the cash price for alcoholic liquors, sold by the case and the cash and/or wholly or partly deferred payment price for alcoholic liquors, when sold in bulk, F.O.B. the supplier's warehouse or the point from which the supplier will make shipment and shall not include the gallonage tax imposed by the Kansas law.

The current prices, F.O.B. point of shipment must be in accordance with Section 2 of Senate Bill 253 which provides that said price as filed by each supplier shall be as low as the lowest price for which the item is sold anywhere in any state in the continental United States by such supplier, and in determining the lowest price for which an item of alcoholic liquor is sold in any such state the supplier shall take into consideration all advertising, depletion and promotional allowances and rebates of every kind whatsoever made to purchasers in such states by the supplier.

Price postings of alcoholic liquors offered in bulk, posted by the barrel, shall show the age, price per proof gallon and original gauge in bond, for each class and type of the particular brand or brands, if any, under which such alcoholic liquors in bulk will be bottled.

These postings above-mentioned shall be filed by the supplier desiring to do business in this state on or before June 20, 1961, to be effective August 1, 1961, for a three

month period. These dates alter those set forth in the last paragraph of Memorandum 61-42 issued by this office. When filing these prices with the Director there shall be one original and three copies. On said posting will be a sworn statement by a qualified member of the supplier's organization that said prices meet the requirements of Section 2 of Senate Bill 253.

Each supplier shall on the same day and date said price posting is forwarded to the office of the director, forward by certified mail to each and every licensed distributor within the state of Kansas, a true and correct copy of such price posting which said supplier has forwarded to the office of the director. Each said supplier shall also file with the director an affidavit stating that true and correct copies of said prices have been forwarded by certified mail to each and every licensed distributor within the state of Kansas. The failure to mail copies of such price posting or to file the required affidavit herein shall render such price posting ineffective, and such supplier upon such failure to comply with this provision may be denied authority to sell alcoholic liquors to licensed distributors within the state of Kansas.

Pursuant to Section 7 of Senate Bill 253 all suppliers who have filed their prices with the director shall be chargeable with a reasonable fee for the printing and mailing of the prices published by the director. Such fee shall be as follows: one dollar ($1.00) per item per size with a minimum charge of ten dollars ($10.00) for those suppliers offering ten or fewer sizes.

/s/ Walter Reed Gage
WALTER REED GAGE, Director

WRG:c

APPENDIX G

General Statutes of Kansas, 1949

Declaratory Judgment

60-3127. *Jurisdiction; actual controversy necessary.* In cases of actual controversy, courts of record within the scope of their respective jurisdictions shall have power to make binding adjudications of the right, whether or not consequential relief is, or at the time could be, claimed, and no action or proceedings shall be open to objection on the ground that a judgment or order merely declaratory of right is prayed for. Controversies involving the interpretation of deeds, wills, other instruments of writing, statutes, municipal ordinances, and other governmental regulations, may be so determined, and this enumeration does not exclude other instances of actual antagonistic assertion and denial of right. [L. 1921, ch. 168, §1; Feb. 23; R. S. 1923, §60-3127.]

60-3128. *Procedure.* Declaratory judgments may be obtained and reviewed as other judgments, according to the code of civil procedure. [L. 1921, ch. 168, §2; Feb. 23; R. S. 1923, §60-3128.]

60-3129. *Further relief; petition; orders to show cause.* Further relief based on a declaratory judgment may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party

whose rights have been adjudicated by the declaration of right, to show cause why further relief should not be granted forthwith. [L. 1921, ch. 168, §3; Feb. 23; R. S. 1923, §60-3129.]

60-3130. *Trial; issues of fact, how submitted.* When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not. [L. 1921, ch. 168, §4; Feb. 23; R. S. 1923, §60-3130.]

60-3131. *Costs.* The parties to a proceeding to obtain a declaratory judgment may stipulate with reference to the allowance of costs, and in the absence of such stipulation the court may make such an award of costs as may seem equitable and just. [L. 1921, ch. 168, §5; Feb. 23; R. S. 1923, §60-3131.]

60-3132. *Remedial Character and construction of act.* This act is declared to be remedial; its purpose is to afford relief from the uncertainty and insecurity attendant upon controversies over legal rights, without requiring one of the parties interested so to invade the rights asserted by the other as to entitle him to maintain an ordinary action therefor; and it is to be liberally interpreted and administered, with a view to making the courts more serviceable to the people. [L. 1921, ch. 168, §6; Feb. 23; R. S. 1923, §60-3132.]

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IN THE

SUPREME COURT OF THE UNITED STATES

SUPREME COURT, U.S.
FILED
NOV 2 1966
JOHN F. DAVIS, CLERK

OCTOBER TERM 1966

No. 675

LAIRD & COMPANY, a Corporation; AFFILIATED DISTILLERS BRAND CORP., a Corporation; BROWN-FOREMAN DISTILLERS CORP., a Corporation; CANADA DRY CORPORATION, a Corporation; GLENMORE DISTILLERIES COMPANY, a Corporation; GOODERHAM & WORTS, LIMITED, a Corporation; HIRAM WALKER INCORPORATED, a Corporation; HUEBLEIN, INC., a Corporation; JAMES B. BEAM DISTILLING CO., INC., a Corporation; JAS. BARCLAY & CO., LIMITED, a Corporation; MR. BOSTON DISTILLER, INC., a Corporation; NATIONAL DISTILLERS AND CHEMICAL CORPORATION, a Corporation; STITZEL-WELLER DISTILLERY, INC., a Corporation; THE AMERICAN DISTILLING COMPANY, a Corporation; THE FLEISCHMANN DISTILLING CORP., a Corporation; THE HOUSE OF SEAGRAM, INC., a Corporation; W. A. TAYLOR & COMPANY, a Corporation; HIRAM WALKER-G. & W. INC., a Corporation; BARTON DISTILLING COMPANY, a Corporation; BACARDI IMPORTS, INC., a Corporation; MOGEN DAVID WINE CORPORATION, a Corporation; PUBLICKER DISTILLER PRODUCTS, INC., a Corporation; RENFIELD IMPORTERS, LTD., a Corporation; SCHIEFFELIN & CO., a Corporation; FROMM & SICHEL, INC., a Corporation; PAUL MASSON, INC., a Corporation; STAR HILL DISTRIBUTING CO., a Corporation; McCORMICK DISTILLING CO., a Corporation; E. J. GALLO WINERY, a Corporation; McKESSON & ROBBINS, INCORPORATED, a Corporation; TWENTY-ONE BRANDS, INC., a Corporation; MEDAL DISTILLED PRODUCTS, INC., a Corporation,
Appellants,

vs.

J. R. CHENEY, Director of Alcoholic Beverage Control; EVERETT STEERMAN, ROBERT F. GALLOWAY and ALFRED WILLIAMS, Members of the Alcoholic Beverage Control Board of Review; ROBERT C. LONDERHOLM, Attorney General of the State of Kansas,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

MOTION TO DISMISS

Of Counsel:
PARK McGEE
Assistant Attorney General
of Kansas
Statehouse
Topeka, Kansas

ROBERT C. LONDERHOLM
Attorney General of Kansas
Statehouse
Topeka, Kansas
Attorney for Appellees

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-8080

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1966

No. 675

LAIRD & COMPANY, a Corporation; AFFILIATED DISTILLERS BRAND CORP., a Corporation; BROWN-FOREMAN DISTILLERS CORP., a Corporation; CANADA DRY CORPORATION, a Corporation; GLENMORE DISTILLERIES COMPANY, a Corporation; GOODERHAM & WORTS, LIMITED, a Corporation; HIRAM WALKER INCORPORATED, a Corporation; HUEBLEIN, INC., a Corporation; JAMES B. BEAM DISTILLING CO., INC., a Corporation; JAS. BARCLAY & CO., LIMITED, a Corporation; MR. BOSTON DISTILLER, INC., a Corporation; NATIONAL DISTILLERS AND CHEMICAL CORPORATION, a Corporation; STITZEL-WELLER DISTILLERY, INC., a Corporation; THE AMERICAN DISTILLING COMPANY, a Corporation; THE FLEISCHMANN DISTILLING CORP., a Corporation; THE HOUSE OF SEAGRAM, INC., a Corporation; W. A. TAYLOR & COMPANY, a Corporation; HIRAM WALKER-G. & W. INC., a Corporation; BARTON DISTILLING COMPANY, a Corporation; BACARDI IMPORTS, INC., a Corporation; MOGEN DAVID WINE CORPORATION, a Corporation; PUBLICKER DISTILLER PRODUCTS, INC., a Corporation; RENFIELD IMPORTERS, LTD., a Corporation; SCHIEFFELIN & CO., a Corporation; FROMM & SICHEL, INC., a Corporation; PAUL MASSON, INC., a Corporation; STAR HILL DISTRIBUTING CO., a Corporation; McCORMICK DISTILLING CO., a Corporation; E. J. GALLO WINERY, a Corporation; McKESSON & ROBBINS, INCORPORATED, a Corporation; TWENTY-ONE BRANDS, INC., a Corporation; MEDAL DISTILLED PRODUCTS, INC., a Corporation,
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vs.

J. R. CHENEY, Director of Alcoholic Beverage Control; EVERETT STEERMAN, ROBERT F. GALLOWAY and ALFRED WILLIAMS, Members of the Alcoholic Beverage Control Board of Review; ROBERT C. LONDERHOLM, Attorney General of the State of Kansas,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

MOTION TO DISMISS

Appellees move to dismiss this appeal on the ground that it does not present any substantial federal question.

1

STATEMENT OF THE CASE

The 1961 Session of the Kansas Legislature enacted a statute relating to the pricing of alcoholic liquor in the State of Kansas at the manufacturer, distributor and retailer levels. The same now appears as K.S.A. 41-1111 to 41-1121, inclusive (Jurisdictional Statement, Appendix D). This statute in substance provides that when manufacturers of alcoholic liquor post the prices at which they will sell alcoholic liquor to Kansas distributors, as required by K.S.A. 41-1101 (Jurisdictional Statement, Appendix E), the manufacturers shall post at prices which are no higher than the lowest price at which the same liquor is sold to any distributor within the United States. It further provides that the Alcoholic Beverage Control Board of Review (hereinafter referred to as the Board) shall determine the minimum sale prices for alcoholic liquor sold by distributors and retailers in Kansas under the conditions and standards set by the statute.

The minimum sales price to be fixed for sales by distributors and retailers is to be established by the Board, taking into consideration the following factors, as set forth in Section 6 of the statute (K.S.A. 41-1116): (a) The acquisition costs to be licensed distributors and retailers; (b) federal, state, and local taxes and license fees paid by distributors and retailers which are levied or imposed in connection with their business of distributing or selling alcoholic liquor in this state; (c) selling costs of licensed distributors and retailers; (d) cost of transportation to distributors from the F.O.B. shipping point to a base point in the State of Kansas; and delivery charges in connection with the shipment of alcoholic liquor; (e) any legitimate, reasonable expense not hereinbefore specified, incurred

in the legal conduct of their businesses as licensed distributors and retailers; and, (f) a reasonable markup or profit for the licensed distributors and retailers.

Pursuant to this statute, the Director of Alcoholic Beverage Control (hereinafter referred to as the Director) issued Memorandum No. 61-48 on May 19, 1961, to implement this statute in the price postings for the three-month period commencing August 1, 1961. This memorandum appears in Volume II of the Record as Plaintiffs' Exhibit No. 10 and as Appendix F, page A41, in the Appellants' Jurisdictional Statement.

On June 14, 1961, 18 manufacturers of alcoholic liquor (appellants herein) filed a joint petition for declaratory judgment and injunctive relief against the enforcement of K.S.A. 41-1112 (Section 2 of the statute) and the remaining portions of the act. On that same day, these plaintiffs obtained a temporary restraining order against the enforcement of the act. Attached to the motion for temporary restraining order were affidavits of corporate officers of appellants Laird, Brown-Foreman, Glenmore, National Distillers Products, Stitzel-Weller, Seagram, and Fleischmann. The original restraining order was subsequently modified, and in May and June 1963, 17 additional manufacturers or suppliers became parties plaintiff.

The matter was tried by the District Court of Shawnee County, Kansas, on December 9, 10 and 11, 1963, at which time evidence was introduced by appellants consisting of depositions of officers of appellants Brown-Foreman (R. 146), Stitzel-Weller (R. 147), Glenmore (R. 147), National Distillers Products (R. 148), and Seagram (R. 150), and the deposition of a marketing consultant to the liquor industry (R. 144). Total narrative of the testimony is contained in the Alternative Narrative Statement contained in the Record at pages 151 through 330. The evidence

introduced on behalf of the defendants consisted of the affidavits of 42 manufacturers and suppliers of alcoholic liquor which had been filed with the office of Alcoholic Beverage Control of the State of Kansas, pursuant to and in compliance with K.S.A. 41-1112 (R. 151, Exhibits D1 through D42). The trial court made findings of fact and conclusions of law and in general found the statute to be unconstitutional under various state and federal constitutional provisions.

The appellees perfected an appeal to the Kansas Supreme Court which reversed the district court on all questions and held the statute to be constitutional. The opinion of the Kansas Supreme Court appears in the appellants' Jurisdictional Statement as Appendix A, commencing at page A1. Following the denial of rehearing, the appellants have taken this appeal, raising the federal questions previously outlined. Three of the corporate plaintiffs did not appeal.

ARGUMENT

The statute involved in this case is similar, although not identical, to that statute which this Court reviewed in *Joseph E. Seagram and Sons, Inc.* v. *Hostetter*, 384 U.S. 35 (1966). The various questions raised by the appellants here are in the main answered in that case quite convincingly and totally adversely to the position of the appellants.

The appellants contend that the case at bar is within an area left undecided by this Court in the Seagram case. However, the appellants misconstrue the status of the two cases. The appellants' position is that the Kansas statute is not merely being adjudicated on its face but as construed and applied. The statute here in question has never, during

the litigation of this question in the state courts, been applied to the appellants, and subsequent regulations under and applications of the statute are not before this Court. The appellants made their own construction of the statute and attempted to litigate the case on the basis of that construction. The district court agreed with them, but the Kansas Supreme Court disagreed and construed the statute. The appellants' construction and testimony concerning the ramifications of this statute are similar in this case to those reviewed by this Court in *Joseph E. Seagram and Sons, Inc.* v. *Hostetter,* supra. There is no testimony in the record in this case which was taken after either the New York law or the Kansas law was enforced against any appellant. Accordingly, the interstate commerce ramifications which the appellants urge as a basis for holding this statute unconstitutional are no more fully explored in this case than they were in the Seagram case. Moreover, the liquor on which the appellants must file price lists is liquor destined for distribution and use solely within the State of Kansas. In this manner, the case at bar is identical to the Seagram case. Kansas has not attempted to tell the appellants what price they may charge in any other state, but only what price they may charge on liquor which would be sold to Kansas distributors for distribution, use and consumption in the State of Kansas.

The one area that is perhaps not determined by *Joseph E. Seagram and Sons, Inc.* v. *Hostetter,* supra, is the vague and indefinite argument which the appellants make. However, this vagueness is really settled and all questions of construction are resolved by the opinion of the Supreme Court of Kansas. Whatever doubt appellants may have had as to what is contemplated by the statute can no longer exist; hence, the statute is not void for vagueness. *United States* v. *National Dairy Products Corp.*, 372 U.S. 29 (1963). Additionally, it should be pointed out that while these 32

appellants have never attempted to comply with this statute prior to the opinion of the Kansas Supreme Court, evidence was introduced to show that 42 suppliers of alcoholic liquor were in fact filing the required affidavits and were apparently able to make the determinations necessary for such affirmations. The appellants disagree with the construction placed on the statute by the Kansas Supreme Court; however, this is purely a matter of state law and binding upon this Court. *Huddleston* v. *Dwyer,* 322 U.S. 232 (1944); *Guaranty Trust Co.* v. *York,* 326 U.S. 99 (1945). As to the criminal penalties, these generally relate to a sale below minimum price by a distributor or retailer as prohibited by K.S.A. 41-1117. The sanction imposed against a supplier who fails to affirm that the price filed is as low as the lowest or who files a price above the proper one would be the termination of the supplier as an authorized source of liquor for Kansas licensed distributors.

The appellants contend that this statute deprives them of property by reducing the amount of profit which they may obtain from the sale of a case of alcoholic liquor to a Kansas distributor. That this reduction in price, if any, given to Kansas distributors does not give that distributor a windfall can be seen from two facts. First, most of the reduction would be based on rebates or other reductions of the invoice price given to distributors in other states but not given to the Kansas distributor because of the restrictions of Kansas law. Second, the price reduction is passed on to the retailer and consumer under the provisions of K.S.A. 41-1115 and 41-1116. Therefore, rather than discriminating in favor of the Kansas distributor, this puts him on an equal footing with that distributor in other states. That there is nothing basically unconstitutional about a maximum price law was reaffirmed by this Court in *Joseph E. Seagram and Sons, Inc.* v. *Hostetter,* supra.

The appellants further contend that this is an arbitrary exercise of power outside of the scope of the police power since the purpose is in part to foster temperance and this particular section of the statute, in the view of the appellants, does not promote temperance. However, Section 2 (now K.S.A. 41-1112) is only a portion of a comprehensive statute regulating prices at all three levels—manufacturer, distributor, retailer. It is quite a strained construction to face each section of a comprehensive statute with each of the announced bases and strike that section if it does not implement all bases. The fact that a statute may be mischievous from the point of view of some state policy is not a basis for declaring it to be unconstitutional. *Osborn* v. *Ozlin*, 310 U.S. 53 (1940).

The appellants have made absolutely no showing that the Kansas statute does in fact violate any constitutional provision or guarantee. They have not shown that the statute as construed and applied (for it has been applied to most of them since September 1, 1966) in this litigation is other than similar to the statute of the State of New York upheld by this Court in *Joseph E. Seagram and Sons, Inc.* v. *Hostetter*, supra. Their forum is, as the Kansas Supreme Court pointed out, the legislature, and not the courts. *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963). Their vagueness argument depends on a construction different from that made by the Kansas Supreme Court, the final arbiter of the construction of the Kansas statute. That the Kansas Supreme Court chose to disregard or overrule findings of the trial court offers no solace to the appellants, for such is not a question of federal law, but is one of state law.

CONCLUSION

There being no substantial federal question raised in this appeal when the questions are viewed in the light of previous decisions of this Court and when the case is viewed on the record, this appeal should be dismissed. *Palmer Oil Corp.* v. *Amerada Petroleum Corp.*, 343 U.S. 390 (1952).

Respectfully submitted,

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